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No. 06-652

In The
Supreme Court of the United States

BART DIDDEN, DOMENICK BOLOGNA, CABERNET 119 REALTY CORP., OPUS 113 CORP., PAUILLAC 115 REALTY CORP., AND 117 NORTH MAIN STREET CORP.,

Petitioners,

v.

THE VILLAGE OF PORT CHESTER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

In *Kelo v. City of New London*, this Court held that economic development within an integrated development plan was a "public use" under the meaning of the Fifth Amendment to the U.S. Constitution. Does *Kelo* therefore completely preclude *all* claims of private purpose takings within an integrated development plan area, including a claim that eminent domain was used for financial extortion and the purely private financial goals of a single party?

What limits if any do the Fifth and Fourteenth Amendments to the U.S. Constitution place on demands for cash in exchange for refraining from the use of eminent domain?

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs below, are Bart Didden, Domenick Bologna, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp. and 117 North Main Street Corp.

Respondents, who were defendants below, are the Village of Port Chester, New York; the Board of Trustees for the Village of Port Chester; Gerald Logan, individually and in his official capacity as Mayor of the Village of Port Chester; Peter J. Ciccone, individually and in his official capacity as Village Trustee for the Village of Port Chester; Daniel Colangelo Jr., individually and in his official capacity as Village Trustee for the Village of Port Chester; John M. Crane, individually and in his official capacity as Village Trustee for the Village of Port Chester; Gerard DiRoberto, individually and in his official capacity as Village Trustee for the Village of Port Chester; Anthony Napoli, individually and in his official capacity as Village Trustee for the Village of Port Chester; Robert Sorensen, individually and in his official capacity as Village Trustee for the Village of Port Chester; G&S Port Chester, LLC.; and Gregory Wasser.

RULE 29.6 DISCLOSURE STATEMENT

Petitioners make the following corporate disclosure statement pursuant to Supreme Court Rule 29.6:

Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp. and 117 North Main Street Corp. are non-governmental corporate parties. None of them has a parent corporation, and no publicly held company has a 10 percent or greater ownership interest in any of these entities.

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The decision of the U.S. Court of Appeals for the Second Circuit of which review is sought was unreported but is available at 173 Fed. Appx. 931, 2006 U.S. App. LEXIS 8653, 2006 WL 898093 (2d Cir. Apr. 5, 2006) and is reproduced in the Appendix at App. 1. The decision of the District Court for the Southern District of New York is reported at 322 F. Supp. 2d 385 (S.D.N.Y. 2004) and reproduced in the Appendix at App. 5.

JURISDICTION

The decision and judgment of the U.S. Court of Appeals for the Second Circuit was entered on April 5, 2006. Petitioners moved for reconsideration en banc, which was denied on August 9, 2006. App. 60. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the public use provision of the Takings Clause of the Fifth Amendment to the United States Constitution and also the due process and equal protection requirements of the Fourteenth Amendment to the U.S. Constitution. App. 62. Jurisdiction was invoked in federal court under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

STATEMENT

The Petitioners in this case have alleged that a private developer approached them and demanded a direct cash payment of $800,000 or a 50% equity interest in Petitioners' business in exchange for not having their property taken by eminent domain.[1] Am. Compl. ¶ 48, March 3, 2004. Petitioners refused, and condemnation papers were filed the following day. *Id.* at ¶ 50. Petitioners further alleged that the condemning body, the Village of Port Chester, knew about and approved of these actions by the private developer and that the condemnation was solely for the purpose of furthering the private financial goals of the developer. *Id.* at ¶ 60. The Petitioners' property was located within a preexisting redevelopment district. *Id.* at ¶ 30.

Petitioners brought this action under 42 U.S.C. § 1983, alleging that the condemnation of their property was for the purpose of satisfying the financial goals of a single private party and not for a public purpose. *Id.* at ¶ 79. They also alleged that the attempted extortion and subsequent condemnation violated their rights to due process and equal protection. *Id.* at ¶ 75, 82, 85. The Southern District of New York granted FRCP 12(b)(6) motions to dismiss the complaint. *Didden v. Village of Port Chester*, 322 F. Supp. 2d 385, 391 (S.D.N.Y. 2004); App. 14. The Second Circuit affirmed, relying on this Court's decision in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005), to hold that a claim of a taking for "private

[1] All facts are taken from the Amended Complaint. The allegations of the Amended Complaint must be accepted as true on an appeal from a dismissal under FRCP 12(b)(6). *See, e.g., Sutton v. United Airlines*, 527 U.S. 471, 475 (1999).

use within a redevelopment district" did not state a cause of action on which relief could be granted. *Didden v. Village of Port Chester*, 173 Fed. Appx. 931, 933 (2d Cir. April 5, 2006); App. 4.

The Village of Port Chester's redevelopment plans began more than 20 years ago. It originally created the Marina Redevelopment Urban Renewal Plan in 1982. Am. Compl. ¶ 26. It modified the plan in 1991 and selected a developer to implement the plan. *Id.* In 1997, the Village selected a different private developer, Respondent G&S Port Chester, LLC. *Id.* at ¶ 27. Then, on or about July 14, 1999, the Village approved a further modification and enlargement of the Marina plan, now called the Modified Marina Redevelopment Urban Renewal District ("Redevelopment District"). *Id.* at ¶ 29. The 1999 Redevelopment District included some of Petitioners' property and designated that area for future retail development.[2] *Id.* The Village's approval included a finding of "public purpose" for the future use of eminent domain within the Redevelopment District. *Id.* at ¶ 31. *See* N.Y. Em. Dom. Proc. Law § 204. Petitioners did not challenge the 1999 Redevelopment District or the finding of "public purpose" made in 1999. Am. Compl. ¶ 31.

In 2003, nearly four years after the Redevelopment District was approved, representatives of CVS Pharmacy approached Petitioners about the possibility of constructing a CVS Pharmacy on their property within the redevelopment area and on contiguous properties, also owned by Petitioners, that lay outside the redevelopment area. *Id.* at

[2] Petitioners owned or controlled an assemblage of contiguous property that straddled the Redevelopment District, with some property inside the district and some outside. *Id.* at ¶ 32.

¶¶ 32-33. The planned CVS Project would have redeveloped a total of .76 acres of land on which all existing structures would be razed and replaced with a new 12,150 square foot building offering a drive-thru prescription window and on-site parking spaces. *Id.* at ¶ 35.

Petitioner applied for the necessary approvals from the Village of Port Chester Planning Commission. On November 26, 2003, the Planning Commission gave preliminary site plan approval for the project and determined that no further environmental review was necessary. *Id.* at ¶ 44. Petitioners then entered into a lease agreement for the CVS Project with CVS Port Chester, LLC, a wholly-owned subsidiary of CVS Corporation. *Id.* at ¶ 47. The initial term of the CVS lease was 25 years, and potential renewals of the lease could extend the total term to more than 48 years. *Id.*

After Petitioners began the process of obtaining the necessary approvals for the CVS project, representatives of the Village of Port Chester directed Petitioners to meet with Respondent Gregg Wasser, one of the principals of Respondent G&S Port Chester, the Village's chosen developer for the Redevelopment District. *Id.* at ¶ 48. On November 5, 2003, Petitioners met with Wasser and his lawyer to discuss Petitioners' proposed CVS Project. *Id.* During this meeting, Wasser demanded that Petitioners pay him the sum of $800,000 or make him a 50% partner in the CVS Project. *Id.* If Petitioners refused, Wasser stated that he would cause the Village to commence a condemnation proceeding and take Petitioners' properties within the Redevelopment District. *Id.* Wasser calculated the $800,000 demand solely based upon his estimate that development of the property as a retail pharmacy use would yield approximately $2,000,000 in profit. *Id.* at ¶ 49.

Petitioners refused to pay Wasser the $800,000 or to make him a partner in the project. *Id.* at ¶ 48.

Petitioners refused Wasser's demands on November 5, 2003. *Id.* The very next day, November 6, 2003, the Village of Port Chester filed a condemnation petition to acquire Petitioners' property so that it could be transferred by lease to G&S Port Chester in order to construct a Walgreens. *Id.* at ¶¶ 50, 62. Over the next several months, Petitioners repeatedly told the Village Board about the $800,000 demand and requested that it suspend the condemnation, but the Village declined to do so, instead again directing Petitioners to negotiate with Wasser. *Id.* at ¶¶ 51, 54, 56. The Village approved of Wasser's actions and allowed Wasser to decide that Petitioners' property would be taken by eminent domain. *Id.* at ¶ 60.[3]

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[3] The relevant portions of the Amended Complaint read as follows:

> 48. On or about November 5, 2003, pursuant to the direction of Defendant Village of Port Chester, Plaintiffs met with Defendant Wasser and his counsel to discuss the CVS Project. During this meeting, Defendant Wasser demanded that Plaintiffs pay him the sum of $800,000.00, or else he would cause Defendant the Village to commence a condemnation proceeding against the Subject Properties and thereby divest Plaintiffs of title. In addition to demanding that Plaintiffs pay him $800,000.00 in order to avert a condemnation proceeding, Defendant Wasser also offered to allow Plaintiffs to proceed with their CVS Pharmacy project if they (the Private Defendants) were given a partnership interest in the redevelopment. Plaintiffs refused to accept either of these demands.
>
> 49. The Private Defendants calculated their $800,000.00 demand solely based upon Defendant Wasser's estimate of the profit to be realized by whoever developed the Subject Properties. In particular, Defendant Wasser estimated that redevelopment of the Subject Properties as a retail pharmacy use would yield approximately $2,000,000.00 in profit

(Continued on following page)

Petitioners then brought this action against the Village, the Village Board of Trustees, G&S Port Chester, and Wasser, alleging that their actions violated the public use, due process, and equal protection requirements of the U.S. Constitution. *See* U.S. Const. amends. V, XIV; App. 62. The action, filed on January 16, 2004, was brought under 42 U.S.C. § 1983. Petitioners claimed that the condemnation of their property was for private financial gain and not for a public purpose, that the $800,000 demand was an unconstitutional exaction, and that the demand and

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for the developer(s) who successfully completed such a project.

56. At the conclusion of the Village Board meeting, Plaintiffs' counsel asked Special Counsel Tulis to adjourn the Petition in the Condemnation Proceeding while the parties discussed the matter per Mayor Logan's "announcement." Special Counsel Tulis responded that the Condemnation Proceeding would not be adjourned unless Defendant G&S Port Chester (who is not a party to the Condemnation Proceeding) consented to such adjournment. Special Counsel Tulis reiterated that Defendant Village Board wished Plaintiffs to deal directly with Defendant G&S through him.

60. The Private Defendants have engaged in an unlawful course of conduct with the actual knowledge and approval of the Public Defendants. The Public Defendants have completely abdicated their responsibilities, as public servants and state actors within the meaning of 42 U.S.C. § 1983, to implement their statutory power of eminent domain solely to promote public uses and good works. Instead, the Public Defendants have knowingly allowed the Private Defendants to wield and implement the eminent domain power to further their own purely private financial goals. Incredibly, with full knowledge of the Private Defendants' outrageous, lawless conduct with respect to Plaintiffs' CVS Pharmacy project, the Public Defendants have allowed the Private Defendants to control the course of the Condemnation Proceeding.

subsequent condemnation violated their rights to due process and equal protection.

Respondents moved to dismiss the action, and Plaintiffs served an Amended Complaint as a matter of right.[4] In a published opinion dated May 25, 2004, the District Court granted the motions and dismissed the Amended Complaint. The District Court held that because the developer could cause the Village to condemn the property under the redevelopment plan, Wasser's threat to do what he was entitled to do by law did not violate the Constitution. 322 F. Supp. 2d at 390; App. 6. Because neither the $800,000 demand nor any aspect of the condemnation itself was actionable, Petitioners could only challenge the condemnation by challenging the entire redevelopment plan – but any challenge to the 1999 plan was barred by the statute of limitations. *Id.* at 388, 390; App. 10, 12.

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed, on the grounds that Petitioners' claims were time-barred and that they had failed to state a cause of action. Although they are portrayed as two distinct holdings, both rest on the identical legal conclusion: a challenge to the purpose of a particular condemnation within a redevelopment area is not constitutionally cognizable. According to the Second Circuit, this Court's decision in *Kelo v. City of New London* foreclosed any challenge to condemnation for "private use within a redevelopment district." 173 Fed. Appx. at 933; App. 4.

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[4] Petitioners initially sought a preliminary injunction, which was denied. *See Didden v. Village of Port Chester*, 304 F. Supp. 2d 548 (S.D.N.Y. 2004); App. 16. Petitioners appealed the denial of the injunction, but voluntarily dismissed the appeal as moot after the state court ordered the transfer of title to Respondents.

Petitioners claimed that the $800,000 demand and subsequent events showed that the condemnation of their property in 2003 was for a purely private purpose. However, the Second Circuit held that the only legally cognizable challenge to the condemnation would be a challenge to the public purpose of the 1999 Redevelopment District. That challenge was time-barred by the three-year statute of limitations. Because Petitioners alleged that the condemnation of their specific property had a purely private purpose and did not challenge the public purpose of the Redevelopment District itself, they had not stated a cause of action. *Id.*; App. 3. Finally, the court found that the $800,000 demand did not constitute an unlawful exaction or equal protection violation. *Id.*; App. 4.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES A SUBSTANTIAL FEDERAL QUESTION ON AN ISSUE OF NATIONAL IMPORTANCE CONCERNING WHETHER THIS COURT'S DECISION IN *KELO V. CITY OF NEW LONDON* CREATES CONSTITUTIONAL IMMUNITY WITHIN REDEVELOPMENT AREAS AND FORECLOSES ALL CHALLENGES TO PRIVATE PURPOSE TAKINGS WITHIN REDEVELOPMENT AREAS.

The Second Circuit interpreted this Court's holding in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005), to mean that any use of eminent domain within a redevelopment district is constitutional, *as a matter of law*. This interpretation is both incorrect and dangerous. *Kelo* should not be read to cut off all judicial review of

condemnations within redevelopment areas, regardless of the facts surrounding those condemnations.

The salient facts in this case are few:

- The Village of Port Chester authorized a Redevelopment District in 1999.
- In 2003, the private developer told Petitioners that he would have their property condemned unless they either paid him $800,000 or gave him a 50% equity interest in their project. The developer sought a share in Petitioners' expected profits.
- The Village of Port Chester condemned Petitioners' properties the day after they refused to comply with the developer's demands. The Village knew about and approved the developer's actions.

The legal question is a simple one: In charging that the purpose of the condemnation of their property was promoting the "purely private financial goals" of the developer, did Petitioners state a cause of action cognizable by the courts?

The Second Circuit, relying on *Kelo*, held that because the condemnation took place within a designated redevelopment area, Petitioners did not state a cause of action. In the Second Circuit's view, once a municipality has gone through its planning process and created a designated redevelopment area where eminent domain is authorized to implement a redevelopment plan, that area becomes, in effect, a constitution-free zone; any use of eminent domain will be deemed constitutional under *Kelo*. Thus, the court explained that "to the extent that [Petitioners] assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district . . . the recent Supreme Court decision in *Kelo v.*

City of New London, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), obliges us to conclude that they have articulated no basis on which relief can be granted." 173 Fed. Appx. at 933; App. 3-4.

The issue in this case is one of broad impact because takings that result in private ownership normally do occur within redevelopment areas. These areas usually encompass multiple properties, and redevelopment designations routinely remain in place for decades. If the Second Circuit's interpretation is allowed to stand, it will effectively insulate condemnations in redevelopment areas from judicial review. Because this case comes to the Court on a motion to dismiss, it provides an unusually clear legal setting for the Court to address this issue. The Court need only decide if an allegation of condemnation for purely private financial gain states a cause of action when the property sits within an "integrated development plan" area. *Kelo*, 125 S. Ct. at 2655.

A. *Kelo* creates confusion on whether redevelopment areas create constitutional immunity to all private purpose takings claims.

The Second Circuit's ruling reflects an issue left open by the Court in *Kelo*. *Kelo* acknowledges that the Constitution still forbids private purpose takings but gives little explanation as to what those might look like. "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 125 S. Ct. at 2661; *see also id.* at 2669 ("Transfers intended to confer benefits on particular, favored private entities, and

with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.") (Kennedy, J., concurring).

The apparent source of the Second Circuit's confusion is that the *Kelo* majority seems to assume that abusive condemnations will take place only "outside the confines of an integrated development plan." The Court explains that the *Kelo* facts did not present "a one-to-one transfer of property, executed outside the confines of an integrated development plan." It then comments that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot" and that "[c]ourts have viewed such aberrations with a skeptical eye." 125 S. Ct. at 2667 and n.17.[5]

Kelo's further explanation that "we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project" strengthens the impression that courts should not examine the events surrounding particular takings within a redevelopment plan area to determine if they are unconstitutional. *See* 125 S. Ct. at 2668. And indeed, the Second Circuit explicitly relies on that passage to conclude that it should not examine whether the particular taking of

[5] To complicate matters further, the Court cites *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. Mar. 7, 2003) as an example of an improper private taking because it constituted a one-to-one transfer of property "outside the confines of an integrated development plan." *Kelo*, 125 S. Ct. at 2667 n.17. However, *99 Cents* is actually an example of a private use taking *within* a redevelopment area. *See 99 Cents*, 237 F. Supp. 2d at 1125 ("In 1983 . . . Lancaster enacted an ordinance establishing the Amargosa Redevelopment Project Area and adopted a Redevelopment Plan. . . .").

Petitioners' property was for an impermissible private purpose. *See* 173 Fed. Appx. at 933; App. 4.

Justice Kennedy's concurrence, however, explains that courts must look at the record to determine if the condemnation has a private purpose. "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Id.* at 2669. Both the majority and the concurrence state that takings on the mere "pretext" of a public purpose would violate the Constitution. *Id.* at 2661 (majority opinion); 2669 (Kennedy, J., concurring). In doing so, they allude to a well-established line of pre-*Kelo* cases that do exactly what Justice Kennedy suggests: they examine the facts of particular condemnations to determine if the stated public purpose is genuine or a mere pretext for a private purpose. Such pretextual condemnations can and often do occur within a larger and generally valid development scheme.[6] Yet, in the Second Circuit's view, *Kelo* has apparently

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[6] *See, e.g.*, *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1210-11, 1229 (C.D. Cal. 2002); *99 Cents Only Stores*, 237 F. Supp. 2d at 1125 (C.D. Cal. 2001); *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. 1998) (hotel development plan generally valid but particular contract with private developer gave impermissible "blank check" to developer); *In re Condemnation of 110 Wash. St.*, 767 A.2d 1154, 1156 (Pa. Commw. Ct. 2001); *Redev. Auth. v. Owners*, 274 A.2d 244, 252 (Pa. Commw. Ct. 1971) (property within urban renewal area taken to provide substitute property to another party whose other property was being condemned for a public project); *City of Dayton v. Keys*, 252 N.E.2d 655, 660-61 (Ohio Ct. Comm. Pleas 1969) (property within urban renewal plan area condemned in order to satisfy contractual obligation to single developer).

turned redevelopment areas into constitution-free zones – any taking, however pretextual the public purpose, will pass muster as long as it occurs within a redevelopment area.

Nearly all condemnations for transfer to private parties occur pursuant to development plans or within designated redevelopment areas.[7] In the Second Circuit's view, once a redevelopment designation has been established, however, there can be no judicial review of takings within the area, for as long as the redevelopment designation lasts. Redevelopment designations usually last for decades. *See, e.g., Redev. Agency v. Rados Bros.*, 115 Cal. Rptr. 2d 234, 237 (Cal. Ct. App. 2001) (redevelopment project originally adopted in 1974); *Aposporos v. Urban Redev. Comm'n*, 790 A.2d 1167, 1174 (Conn. 2002) (redevelopment plan originally adopted in 1963); *Mounts v. Evansville Redev. Comm'n*, 831 N.E.2d 784, 789 (Ind. Ct. App. 2005) (redevelopment plan originally adopted in 1984). The particular iteration of the redevelopment plan in this case spans ten years, although there has been a redevelopment area designation for more than 20 years.

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[7] State reporters are replete with cases involving private-to-private transfers within the context of a larger plan. *See, e.g., Birmingham v. Tutwiler Drug Co.*, 475 So. 2d 458, 460-61 (Ala. 1985); *Mar. Ventures, LLC v. City of Norwalk*, 894 A.2d 946, 952-53 (Conn. 2006); *State ex. rel. United States Steel v. Koehr*, 811 S.W.2d 385, 387 (Mo. 1991); *City of Las Vegas Downtown Redev. Agency*, 76 P.3d 1, 6-7 (Nev. 2003). Most states authorize municipalities to condemn property within the context of redevelopment plans or designated redevelopment zones. *See, e.g.*, Ark. Code Ann. § 14-168-304(7)(a); 20 Ill. Comp. Stat. 620(9)(b); Va. Code Ann. § 36-27(A). *See also* Wendell E. Pritchett, *Beyond Kelo: Thinking about Urban Development in the 21st Century*, 22 Ga. St. L. Rev. 895, 912-14 (2006) (describing the use of development plans to transfer property to private developers). Redevelopment area plans authorize the use of eminent domain against multiple properties.

Am. Compl. at ¶ 26. In many states, redevelopment area designations *never* expire. *See, e.g.*, 315 Ill. Comp. Stat. 5/13; Nev. Rev. Stat. §§ 279.572, 589; N.J. Stat. §§ 40A:12A-4, -5, -14; W. Va. Code § 16-18-5. If the Second Circuit is correct that *Kelo* precludes, as a matter of law, any and all private use takings claims within the borders of a redevelopment area, then developers and local governments will have a free pass, as in this case, to use their power for private gain with impunity. This Court should not condone such a result.

B. This case presents an unusually clear setting to consider whether *Kelo* forecloses all private use challenges within a redevelopment plan area.

Petitioners recognize that the *Kelo* decision is little more than a year old and that this Court might be inclined to wait before clarifying the decision. Nonetheless, Petitioners ask this Court to consider their challenge now.[8] It presents the issue in the starkest possible terms. The validity of the Redevelopment District itself has not been challenged, so it must be accepted as valid for purposes of this action. Petitioners have alleged that a private developer demanded a cash payment or business equity in exchange for not taking their property that lay within the

[8] Although the Court sometimes lets issues percolate after a decision, it also sometimes grants certiorari to clarify doctrinal points it has recently addressed. *See, e.g., Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (June 5, 2006) (granting writ of certiorari) and *Grutter v. Bollinger*, 539 U.S. 306 (2003); *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

"integrated development plan" area. The developer based his demand solely on his estimate of Petitioners' likely profits and his desire to share in those profits. The local government fully approved and supported this threat and condemned Petitioners' property when they did not accede to the developer's demands. The condemnation served only to further the private financial goals of the developer. Because the case was dismissed under FRCP 12(b)(6), these facts must be accepted as true. There are no issues of evidentiary weight or deference to lower court decisions. There are no possible arguments about mixed motives. There are no thorny issues of whether the actions occurred under color of state law. The sole question is whether an owner alleging the use of eminent domain for attempted financial extortion and to assist the purely private financial goals of a single private party has stated a cause of action under the Constitution, even when the condemnation takes place within an "integrated development plan" area.

The fact that Petitioners' claims were rejected by the Second Circuit in a few unpublished sentences suggests the extent to which courts believe *Kelo* has utterly precluded public use challenges, even under shocking circumstances. Previous public use challenges in this Court, including *Kelo*, all included a factual record. *See Kelo*, 125 S. Ct. at 2660; *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 234-35 (1984); *Berman v. Parker*, 348 U.S. 26, 30-31 (1954);[9] *Brown v. United States*, 263 U.S. 78, 80 (1923); *Hairston v. Danville and Western R.R. Co.*, 208 U.S. 598,

[9] While the lower court in *Berman* purportedly decided the case on a motion to dismiss, both parties moved for summary judgment, and the court expressly considered the exhibits and affidavits of both parties. *See Schneider v. Dist. of Columbia*, 117 F. Supp. 705, 708-09 (D.D.C. 1953).

605 (1908); *Clark v. Nash*, 198 U.S. 361, 367-68 (1905). Indeed, because they do depend on facts, non-frivolous as-applied constitutional challenges may be resolved on summary judgment, but they are almost never decided on motions to dismiss. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001); *Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704-06 (1999); *E. Enters. v. Apfel*, 524 U.S. 498, 517 (1998). Even due process challenges under the rational basis test are rarely dismissed on the pleadings. *See, e.g., Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 126-27 (1999); *Minn. v. Clover Leaf Creamery*, 449 U.S. 456, 460-61 (1981). That the Second Circuit believes that, after *Kelo*, public use challenges fall into the tiny category of constitutional challenges that courts shouldn't even bother to hear is cause for genuine alarm.

This Court should grant Petitioners' request for certiorari to clarify *Kelo* now – before continued misunderstanding subjects more individuals to the kind of attempted extortion alleged in this case. *Kelo* may have given the green light to condemnations for economic development, but it should not be allowed to become a complete shield from judicial review for any private purpose taking within redevelopment areas.

II. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE A SPLIT AMONG FEDERAL CIRCUITS AND STATE COURTS OF LAST RESORT ABOUT THE APPROPRIATE LEGAL STANDARD TO APPLY TO DEMANDS FOR CASH PAYMENTS IN EXCHANGE FOR GOVERNMENT DISCRETIONARY ACTION.

By asserting in a single sentence that Wasser's demand for $800,000 in exchange for not condemning

Petitioners' property was not "an unconstitutional exaction in the form of extortion," the panel below glossed over an important, and unresolved, constitutional question. 173 Fed. Appx. at 933; App. 4. The panel held that a demand for a cash payment to stave off a condemnation can never give rise to a constitutional violation. This places the Second Circuit in direct conflict with a number of state courts of last resort that have found constitutional limitations on when governments may demand cash payments as a condition of the use of their discretionary police powers over private property.[10]

A. Lower courts are split over the scope of the unconstitutional exactions doctrine.

Courts of last resort in California, Texas, Oregon, and Illinois have concluded that heightened scrutiny applies to demands for payments of cash as a condition of their exercise of discretionary authority over property. Colorado, Kansas, South Carolina, and the Ninth and Tenth Circuits, however, apply such scrutiny only to demands for the conveyance of interests in real property.

This Court's precedents establish that governments' demands for conveyances of interests in *land* as a condition of their exercise of discretionary authority over property are subject to heightened scrutiny. In *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), this Court invalidated a public easement that the California Coastal

[10] While the demand in this case was made by Respondent Wasser, the Amended Complaint alleges the action was taken under color of state law and that the Village had full knowledge of and approved of Wasser's demands. Am. Compl. ¶ 60.

Commission had demanded as a condition of granting a development permit, finding that the Commission could have required an easement that "serve[d] the same legitimate police-power purpose as a refusal to issue the permit," but could not constitutionally compel an easement that lacked an "essential nexus" with that purpose. *Id.* at 836-37. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court invalidated another easement, holding that, even where that nexus exists, an exaction must have a "rough proportionality" to the impact of a proposed development. 512 U.S. at 391.

This Court's summary reversal of a decision upholding a cash demand also provides good reason to believe that such demands are subject to the same scrutiny as demands for land interests. Only three days after deciding *Dolan*, the Court granted certiorari and vacated a California decision upholding a city's demand for $280,000 in exchange for a rezoning decision, remanding "for further consideration in light of" *Dolan*. *See Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994). On remand, the Supreme Court of California, though divided on other issues, unanimously decided that *Dolan* scrutiny applied to the cash demand, even though the denial of the zoning permit without more would not have been a taking. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 432 (Cal. 1996) (plurality opinion).[11]

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[11] *See also id.* at 459 (Mosk, J., concurring) ("a somewhat higher level of constitutional scrutiny should be applied to . . . [fees imposed] on an individual and discretionary basis" in view of *Nollan* and *Dolan's* concerns about extortion) (interior quotation marks omitted); *id.* at 462 (Kennard, J., concurring and dissenting, joined by Baxter, J.) ("I agree with the majority that *Nollan-Dolan's* . . . requirements apply to monetary exactions that . . . are imposed on a specific parcel of property

(Continued on following page)

Both *Nollan* and *Dolan* involved the exaction of real property, which has led to a great deal of confusion among lower courts when confronted with exactions that appear to be every bit as much "an out-and-out plan of extortion" as those involved in *Nollan*, 483 U.S. at 837, but seek to extort money instead of land. *See Rogers Machinery, Inc. v. Washington Cty.*, 45 P.3d 966, 976 (Ore. 2002) ("Lower court authority appears most sharply divided on the issue of *Dolan's* application to monetary exactions.").

Many courts have simply cabined *Nollan* and *Dolan* to pure physical exactions. *See, e.g., Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) ("[*Nollan* and *Dolan*] are limited to the context of development exactions where there is a physical taking or its equivalent"). These courts have declined to apply heightened scrutiny to anything but physical takings, granting governments extensive power to demand cash payments where they could not demand easements of lesser value. *See, e.g., Comm. Builders of N. Calif. v. City of Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991) ("A purely financial exaction, then, will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed."); *McCarthy v. Leawood*, 894 P.2d 836, 845 (Kan. 1995) ("There is nothing in [*Dolan*], however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee.").

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as a condition of obtaining a development permit."); *id.* at 468 (Werdegar, J., concurring and dissenting) ("I also agree with the reasoning of the plurality opinion [except for a section construing the relevant California statutes]").

Other courts reject this logic. *See, e.g., Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 639-40 (Tex. 2004) (applying *Dolan* to requirement that developer pay for improvements to city property); *Clark v. City of Albany*, 904 P.2d 185, 190 (Ore. 1995) ("[T]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind."). From the standpoint of consistency, this position is eminently reasonable. A rule that provides different levels of scrutiny for a demand for an easement worth $10,000 and a simple demand for $10,000 values "form over function." *Garneau v. City of Seattle*, 147 F.3d 802, 820 (9th Cir. 1998) (O'Scannlain, J., concurring and dissenting). As such, a number of state courts of last resort have adopted the broader, more functional reading of *Nollan* and *Dolan*. *See, e.g., Northern Ill. Home Builders Ass'n v. County of DuPage*, 649 N.E.2d 384, 390 (Ill. 1995) (holding that transportation impact fee requirement was invalid on the grounds that the funds collected could be used in unrelated districts).

Some courts have based their adherence to the narrower theory on this Court's dicta in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), where it noted that it had "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702. The Supreme Court of Colorado, for example, has argued that *Del Monte Dunes* "strongly indicate[s] that the *Nollan/Dolan* test is limited to exactions involving the dedication of property." *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001). *See also Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of*

North Myrtle Beach, 548 S.E.2d 595, 603 n.5 (S.C. 2001) ("[*Del Monte Dunes*] held *Dolan's* 'rough proportionality test' applied only to physical exactions"). *Del Monte Dunes*, however, does no such thing. The opinion merely indicates what the confusion of the lower courts has already shown: that this Court has never conclusively stated whether the unconstitutional exaction doctrine applies to extortionate demands for things other than real property. *See Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 636 (Tex. 2004) ("In neither *Dolan* nor *Del Monte Dunes* did the Supreme Court have reason to differentiate between dedicatory and non-dedicatory exactions.").

B. Lower courts' confusion stems from the muddled nature of the underlying doctrine.

The lower courts' confusion over when to apply heightened scrutiny to exactions is largely a result of uncertainty over the source, and therefore the scope, of the doctrine. Exactions implicate more than one constitutional protection. The Due Process Clause prevents governments from imposing arbitrary or irrational fees. *See Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). This Court's precedents also prevent governments from imposing unconstitutional conditions on the grant of a discretionary privilege. *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 660-62 (1981). All three of these doctrines (unconstitutional conditions, due process, and unconstitutional exactions) are, to some extent, intertwined, and lower courts differ about which of them should be used to analyze governments' extortionate demands – the heightened review of *Dolan* or the rational basis review used in *Schwab*.

This deep doctrinal confusion is best illustrated by a single, splintered panel opinion from the Ninth Circuit. In *Garneau v. City of Seattle*, 147 F.3d 802 (1998), the Ninth Circuit considered a challenge to a law requiring landowners to pay mandatory relocation fees to tenants prior to redeveloping their property (separate from any payments stemming from breaking the tenants' leases). The panel issued three opinions: one holding that *Nollan* and *Dolan* applied only to physical takings, another insisting that claims about cash exactions should be analyzed under the rubric of substantive due process, and a third arguing that heightened scrutiny must apply to both demands for money payments and demands for real property because no principled distinction can be drawn between the two. *Compare id.* at 809 (Brunetti, J.) *with id.* at 815 (Williams, D.J., concurring in the result) *and id.* at 820 (O'Scannlain, J., concurring and dissenting).

C. This case presents an ideal opportunity to clarify the reach of the unconstitutional exactions doctrine.

Since *Dolan*, this Court has only had occasion to address the exactions doctrine in *dicta*, providing little clarity to lower courts. *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005) (explaining the doctrine as "a special application of the 'doctrine of unconstitutional conditions'") (quoting *Dolan*, 512 U.S. at 385) (second internal quotation marks omitted). The Court has not had the opportunity to address the extent to which demands for cash payments trigger heightened scrutiny, or even which constitutional provisions protect property owners from such demands. *Cf. Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S. Ct. 1549, 1551 (2000)

(Scalia, J., joined by Kennedy and Thomas, JJ., dissenting from denial of certiorari) ("When there is uncontested evidence of a demand for money or other property – and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking – it should be up to the permitting authority to establish *either* (1) that the demand met the requirements of *Nollan* and *Dolan* or (2) that the denial would have ensued even if the demands had been met.") (emphasis in original).

This case presents a clear-cut opportunity for this Court to clarify the borders of the competing and complementary doctrines implicated by attempted extortion undertaken by local and state governments or under color of law. By virtue of its unusual posture (in which the Court must take all of the Amended Complaint's allegations as true), it presents a remarkably pure scenario and thus a simple question: may a government (or, as in this case, a private person acting under color of state law) demand a cash payment as a condition of exercising or refraining from exercising its police power over landowners? The Court should capitalize on these circumstances to clarify what limits the Constitution places on demands for compensation by entities that otherwise have unlimited discretion in determining how (and whether) landowners may make use of their property.

CONCLUSION

For all the foregoing reasons, petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted,

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 5, 2006

BART DIDDEN, et al., Plaintiffs-Appellants, v. THE VILLAGE OF PORT CHESTER, et al., Defendants-Appellants.

No. 04-3485-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

173 Fed. Appx. 931; 2006 WL 898095

April 5, 2006, Decided

COUNSEL: For Plaintiffs-Appellants: RICHARD L. O'ROURKE, (Edward J. Phillips, of counsel), Keane & Beane P.C., White Plains, New York.

For Defendants-Appellees Napoli, Colangelo, Logan, DiRoberto, Crane, Ciccone, Sorenson, and the Board of Trustees for the Village of Port Chester: BRIAN J. STONE, (Mark S. Tulis, of counsel), Oxman, Tulis, Kirkpatrick, Whyatt & Geiger, LLP, White Plains, New York.

For Defendants-Appellees G&S Port Chester, LLC and Wasser: ALAN D. SCHEINKMAN, (William E. Dumke, of counsel), DelBello Donnellan Weingarten, Tartaglia Wise & Wiederkehr, LLP, White Plains, New York.

JUDGES: PRESENT: HON. SONIA SOTOMAYOR, HON. REENA RAGGI, HON. PETER W. HALL, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is **AFFIRMED.**

Plaintiffs-Appellants appeal from a May 24, 2004 decision and order of the United States District Court for the Southern District of New York (Colleen McMahon, J.) dismissing their complaint alleging various constitutional violations under 42 U.S.C. § 1983 against the Village of Port Chester and others. We assume the parties' familiarity with the facts and procedural history in this case. We review the District Court's decision to grant a motion to dismiss a complaint pursuant to Fed.R.Civ.P. 12(b)(6) *de novo. Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir.2002).

In April 1998, Defendant-Appellee G & S Port Chester, LLC, ("G & S"), entered into a development agreement with Defendant-Appellee Village of Port Chester that named G & S as the designated developer of a marina redevelopment project. On July 14, 1999, after a public hearing, the Defendant-Appellee Village Board of Trustees adopted a resolution in which it made a finding of public purpose for condemnation of the properties located in the redevelopment district. In March 2003, Appellants discussed with representatives of a pharmacy chain the possibility of constructing a pharmacy on their property. A portion of Appellants' property adjoined the redevelopment district and another portion lay within the redevelopment district. According to Appellants, at a November 2003 negotiation session with Defendants-Appellees G & S and Wasser, Wasser demanded $800,000 from them in order to

avert a condemnation proceeding of their property within the redevelopment district, and offered to allow them to proceed if Defendants-Appellees were given a partnership interest in the project. Appellants refused both demands and, two days later, they received a petition seeking to condemn their property. On appeal, Appellants advance constitutional claims based on the Fifth and Fourteenth Amendments asserting, *inter alia,* that they have a right "not to have their property taken by the State through the power of eminent domain for a private use, regardless of whether just compensation is given."

The statute of limitations applicable to § 1983 claims in New York is three years. *Patterson v. County of Oneida,* 375 F.3d 206, 225 (2d Cir.2004). "While state law supplies the statute of limitations for claims under § 1983, federal law determines when a federal claim accrues." *Connolly v. McCall,* 254 F.3d 36, 41 (2d Cir.2001). Under federal law "a cause of action generally accrues 'when the plaintiff knows or has reason to know of the injury that is the basis of the action.'" *M.D. v. Southington Bd. of Educ.,* 334 F.3d 217, 221 (2d Cir.2003) (quoting *Leon v. Murphy,* 988 F.2d 303, 309 (2d Cir.1993)). Appellants had reason to know of the basis of their injury when the Board announced its public purpose finding on July 14, 1999. Appellants, however, brought suit in January 2004, more than three years after the date their claims accrued, and thus their claims are time-barred. We reject Appellants' contention that their injury actually accrued in November 2003 when G & S and Wasser "first utilized their *de facto* eminent domain power against [them] in an effort to exact a cash payment or partnership interest" in the pharmacy project.

Moreover, even if Appellants' claims were not time-barred, to the extent that they assert that the Takings

Clause prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in *Kelo v. City of New London,* 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), obliges us to conclude that they have articulated no basis upon which relief can be granted. *See id.* at 2668 ("Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project."); *see also Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.,* 771 F.2d 44, 46 (2d Cir.1985). Finally, we agree with the district court that Appellees' voluntary attempts to resolve Appellants' demands was neither an unconstitutional exaction in the form of extortion nor an equal protection violation.

The district court properly dismissed the complaint on the ground that the Appellants' claims are time-barred. Accordingly, the judgment of the district court is hereby AFFIRMED.

APPENDIX B – DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 24, 2004

BART DIDDEN, DOMENICK BOLOGNA, FRED DeCESARE, CABERNET 119 REALTY CORP., OPUS 113 CORP., PAUILLACE 115 REALTY CORP., 117 NORTH MAIN STREET CORP., Plaintiffs,

– against –

THE VILLAGE OF PORT CHESTER, THE BOARD OF TRUSTEES for the VILLAGE OF PORT CHESTER, GERALD LOGAN, individually and in his official capacity as Village Trustee for the Village of Port Chester, DANIEL COLANGELO, JR., individually and in his official capacity as Village Trustee for the Village of Port Chester, JOHN M. CRANE, individually and in his official capacity as Village Trustee for the Village of Port Chester, GERARD DIROBERTO, individually and in his official capacity as Village Trustee for the Village of Port Chester, ANTHONY NAPOLI, individually and in his official capacity as Village Trustee for the Village of Port Chester, ROBERT SORENSEN, individually and in his official capacity as Village Trustee for the Village of Port Chester, G & S Port Chester, LLC. and Gregory Wasser, Defendants.

04 Civ. 0370 (CM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

322 F.Supp. 2d 385

May 25, 2004, Decided

COUNSEL: For Bart Didden, Domenick Bologna, Fred DeCesare, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp., 117 North Main Street Corp., Plaintiffs: Richard L. O'Rourke, LEAD ATTORNEY, Edward J. Phillips, Keane and Beane P.C., White Plains, NY.

For the Village of Port Chester, Defendant: John Ernest Watkins, Jr., Law Office of John E. Watkins, White Plains, NY.

For The Board of Trustees for the Village of Port Chester, Gerald Logan, Peter J. Ciccone, Daniel Colangelo, Jr., John M. Crane, Gerard Diroberto, Anthony Napoli, Robert Sorensen, Defendants: Stuart Evan Kahan, Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP, White Plains, NY.

For G&S Port Chester, LLC, Gregory Wasser, Defendants: Alan David Scheinkman, DelBello Donnellan Weingarten Tartaglia Wise & Wiederkehr, L., White Plains, NY.

JUDGES: Colleen McMahon, U.S.D.J.

OPINION BY: Colleen McMahon

OPINION:

DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

McMahon, J.:

In this action, Defendants seek dismissal pursuant to *Federal Rule of Civil Procedure* 12(b)(6). For the following reasons, Defendants' motion is granted.

This case arises out of a dispute between private developers over a development project (the "Project") associated with the Village of Port Chester's ("Port Chester") redevelopment of twenty-seven acres of its downtown and waterfront areas. I will assume familiarity with the facts of this case, which are explained in detail in *Didden v. Vill. of Port Chester,* 304 F.Supp.2d 548 No. 04 Civ. 0370 (CM), 2004 WL 239718 (S.D.N.Y. Feb. 10, 2003) ("*Didden I*").

On January 16, 2004, Plaintiffs filed a complaint and an order to show cause with this Court, seeking temporary and preliminary injunctive relief that would stay the Condemnation Proceeding, as well as declaratory and monetary relief pursuant to 42 U.S.C. § 1983 against Port Chester and its Board of Trustees (the "Public Defendants") and Private Defendants. I denied Plaintiffs' motion for a preliminary injunction on *Younger* grounds, and because I found that Plaintiffs could not establish a likelihood of success on the merits. I granted Defendants leave to move for dismissal, which they did on February 6, 2004.

On March 3, 2004, Plaintiffs filed an Amended Complaint. The Amended Complaint contains two additional facts: first, that Plaintiffs own or control an assemblage of adjoining properties in Port Chester (the "Subject Properties") that are situated within an urban renewal district known as MUR Marina Redevelopment Project Urban Renewal District (the "MUR District") (Am.Compl.¶¶ 26,

29, 36); and second, that Plaintiffs additionally own or control four adjoining properties that are situated outside the MUR District (*Id.* ¶¶ 33, 37). More importantly, the Amended Complaint contains two additional substantive allegations. First, it alleges that Plaintiffs had no notice that, under New York Eminent Domain Procedure Law ("EDPL"), they had only thirty days to challenge in a judicial proceeding the July 14, 1999 findings by the Port Chester Board of Trustees (the "Board") that the condemnation had a public purpose (*Id.* ¶ 31). Second, it alleges that on February 23, 2004, the Village of Port Chester Planning Commission (the "Planning Commission") granted Plaintiffs final site plan approval to proceed with the Project; it had only granted preliminary approval before then (*Id.* ¶ 45). Finally, the Amended Complaint elaborates upon certain allegations made in the initial pleading, alleging that Defendant Wassler estimated that redevelopment of the Subject Properties as a retail pharmacy use would yield approximately $2,000,000 in profits for the developers who successfully completed such a project, and that he relied solely upon this estimate in formulating his demand that Plaintiffs buy him out for $800,000 (*Id.* ¶ 49).

After reviewing the parties' papers, I now dismiss Plaintiffs' complaint for the reasons discussed in *Didden I* and *Paul v. New York State Dep't of Motor Vehicles,* No. 02 Civ. 8839(AKH), 2003 WL 253065 (S.D.N.Y. Feb. 3, 2003) (Complaint dismissed because a state administrative proceeding was pending), as well as for the following reasons.

A. Standard for Motion to Dismiss.

Dismissal of a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is proper only where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Harris v. City of New York,* 186 F.3d 243, 247 (2d Cir.1999). The test is not whether a plaintiff is ultimately likely to prevail, but whether the claimant is entitled to offer evidence to support the claims. *Chance v. Armstrong,* 143 F.3d 698, 701 (2d Cir.1998). The factual allegations in the complaint are presumed to be true, and all reasonable inferences are drawn in the plaintiffs' favor. *EEOC v. Staten Island Sav. Bank,* 207 F.3d 144 (2d Cir.2000).

B. Statute of Limitations.

In *Didden I,* I held that all of Plaintiffs' claims, which assert that the Project lacks a public purpose or that the LADA improperly invoked Port Chester's eminent domain power relating to public purpose, are time-barred. Plaintiffs, in their Memorandum of Law in Opposition to Defendants' Motion to Dismiss, do not contest that the three-year statute of limitations governing general personal injury actions applies to 42 U.S.C. § 1983 claims brought within New York State. *Owens v. Okure,* 488 U.S. 235, 251, 102 L.Ed.2d 594, 109 S.Ct. 573 (1989); *Brandman v. N. Shore Guidance Ctr.,* 636 F.Supp. 877 (E.D.N.Y. 1986). They also do not contest that while state law provides the limitations period, the issue of when the federal cause of action accrued is a matter of federal law. *Fiesel v. Bd. of Educ. of N.Y.,* 675 F.2d 522, 524 (2d Cir.1982). As stated in my previous opinion, under federal law, a cause of action under § 1983 accrues when the plaintiff knows or has

reason to know of the injury that is the basis of the action. *Barrett v. U.S.*, 689 F.2d 324, 333 (2d Cir.1982), *cert. denied*, 462 U.S. 1131.

As I held in *Didden I*, the statute of limitations began to run on July 14, 1999, once Port Chester authorized a land disposition agreement with G & S, which covered the use of eminent domain incidental to the implementation of the redevelopment Project, and it was found that there was a legitimate public purpose for condemnation. *Didden*, 304 F.Supp.2d 548, 2004 WL 239718 at 16. Plaintiffs, however, assert that they did not suffer any injury until November 5, 2003, when G & S and Wasser allegedly attempted to exact a cash payment from them. Plaintiffs claim that they "could not have envisioned that the Private Defendants could engage in such conduct in March 1999." This argument does not save Plaintiffs' claim from being time-barred.

The March 30, 1999 letter from Plaintiffs to the Board shows that Plaintiffs were fully aware that a finding of public purpose would expose their property to the prospect of condemnation. They even expressed concern that the consequences of Port Chester entering into the LADA with the Private Defendants would mean that they would not have a "level playing field" from which to negotiate with G & S, and that G & S would have leverage because of its option to condemn the property of "those property owners with whom they are unable to finalize a deal." Consequently, Plaintiffs were able to, and did in fact, contemplate Port Chester's actions in 1999. This action was commenced on January 16, 2004, nearly five years after Plaintiffs sent their March 30, 1999 letter, and well over four years after Post [sic] Chester issued a public purpose finding and decided to

enter into a land disposition agreement with G & S. Therefore, I find that all of Plaintiffs' claims are time-barred.

C. Unconstitutional Exactions.

Plaintiffs also make a new argument, trying to analogize this case to a line of cases concerning public exactions. The law permits the government to put conditions on the grant of land use permits so long as the conditions have an essential nexus with legitimate public interests. *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987) (municipality conditioned permit to expand seaside home on public easement across property to reach public beaches); *see also Dolan v. City of Tigard,* 512 U.S. 374, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1984) (municipality conditioned building permit on land owner's setting aside property for a storm drainage system and a public park). Plaintiffs claim that Defendants' threat to use their eminent domain power to condemn the Subject Properties unless Plaintiffs gave them either $800,000 or a partnership interest in the business on the property amounts to an unconstitutional exaction.

No exaction has occurred here. Plaintiffs have not had any conditions placed upon their property during their ownership that limit their ability to use their property. The exaction cases, therefore, have no relevance to the case at bar. There was a preexisting EDPL finding of "public purpose" under Article 2 that went unchallenged by Plaintiffs. It was not until November 2003 that Plaintiffs made any application for municipal land use approvals, and, when they did so, they knew that their property was subject to ongoing condemnation efforts. Since Plaintiffs concede that the July 1999 findings are unchallenged

and that their property was appropriately placed in the condemnation zone, the constitutional public purpose requirement has been met. Plaintiffs have no additional substantive rights other than to receive just compensation from Port Chester pursuant to Articles 3, 4, and 5 of the EDPL.

D. Plaintiffs Have Waived Their Right to Challenge the Public Purpose of the Redevelopment Project.

Plaintiffs allege that they "neither received nor had any notice" that the EDPL Section 207 afforded them only thirty days to bring a judicial challenge after the newspaper publication of the Board's July 14, 1999 findings. It is too late for Plaintiffs to challenge those findings now.

In prior litigation relating to this project, the Second Circuit has addressed this issue, but held that a condemnee can assert a procedural Due Process claim only when he has been "denied notice of the publication of the determination and findings and an opportunity to appeal." *Brody v. Village of Port Chester,* 345 F.3d 103, 113 (2d Cir.2003). Plaintiffs, however, do not claim that they lacked notice of the Article 2 findings; indeed, they concede that they received notice of the public hearing held on July 14, 1999. Nor do they contest that they had an opportunity to appeal. They simply allege that they had no knowledge of the thirty-day time limit to challenge the findings, and consequently they are not within the scope of *Brody.*

Furthermore, Plaintiffs are chargeable with the knowledge of rules and regulations duly adopted pursuant to and under the authority of law. *Flamm v. Ribicoff,* 203 F.Supp. 507 (S.D.N.Y. 1961). The Supreme Court has long

held that "[a]ll persons charged with knowledge of the provisions of statutes must take note of the procedure adopted by them." *N. Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283, 69 L.Ed. 953, 45 S.Ct. 491 (1925). Plaintiffs were fully aware of the consequences of the condemnation findings, as their March 30, 1999 letter to the Board demonstrates. They also had notice of the public hearings that preceded the findings. Since Plaintiffs were on notice of the process and its consequences, they had an obligation to exercise due diligence to ascertain the status of the condemnation proceedings:

> It is well established that due process is not offended by requiring a person with actual timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right. *GAC Enters., Inc. v. Medaglia, (In re Medaglia)* 52 F.3d 451, 455 (2d Cir.1995).

Neither the federal nor state government is required to give individuals notice of the procedures affecting an individual's property rights. *City of W. Covina v. Perkins,* 525 U.S. 234, 243, 142 L.Ed.2d 636, 119 S.Ct. 678 (1999).

E. Extortionate Demand for Payment.

Plaintiffs claim that Defendant Wasser demanded that they pay him the sum of $800,000 or else he would cause Port Chester to condemn the Subject Properties and thereby divest Plaintiffs of title. However, their allegation of an extortionate demand of $800,000 to avoid condemnation adds nothing of legal significance to Plaintiffs' claims. As Plaintiffs themselves assert in their Complaint, G & S and Wasser have the authority under the LADA to obligate Port Chester to pursue condemnation of properties within

the Project's boundaries. (Scheinkman Aff., Ex. A, ¶ 62). Threats to enforce a party's legal rights are not actionable. *DiRose v. PK Mgmt. Corp.*, 691 F.2d 628, 633 (2d Cir.1982). Thus, even if Defendants did request payment in exchange for relinquishing the legal right to request condemnation, Plaintiffs have no recourse.

The EDPL does not require the condemner to negotiate with a private property owner in good faith prior to seeking to acquire title to the property. *Nat'l Fuel Gas Supply Corp. v. Town of Concord,* 299 A.D.2d 898, 752 N.Y.S.2d 187 (4th Dep't 2002). That Port Chester, G & S, and Wasser did meet with Plaintiffs and conveyed a proposal that Plaintiffs found unacceptable does not give Plaintiffs any substantive claims. Plaintiffs pursued their CVS site plan application and the CVS lease knowing that the Private Developers, under the LADA, might attempt to buy or condemn the disputed properties.

F. Unlawful Delegation.

Plaintiffs also allege that at some point during their course of dealing, the Public and Private Defendants dispensed with many of the LADA's provisions concerning Defendant G & S's obligations to provide notices to Port Chester and to fund certain escrow accounts timely. Assuming that this is true for the purposes of the motion to dismiss, Plaintiffs are not parties to the LADA and lack standing to assert any claims under the LADA.

For the reasons set forth above and in my earlier decision, Defendants' motion to dismiss is granted.

Dated: May 25, 2004

Colleen McMahon

U.S.D.J.

APPENDIX C – DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 10, 2004

BART DIDDEN, DOMENICK BOLOGNA, FRED DeCESARE, CABERNET 119 REALTY CORP., OPUS 113 CORP., PAUILLACE 115 REALTY CORP., 117 NORTH MAIN STREET CORP., Plaintiffs,

– against –

THE VILLAGE OF PORT CHESTER, THE BOARD OF TRUSTEES for the VILLAGE OF PORT CHESTER, GERALD LOGAN, individually and in his official capacity as Village Trustee for the Village of Port Chester, DANIEL COLANGELO, JR., individually and in his official capacity as Village Trustee for the Village of Port Chester, JOHN M. CRANE, individually and in his official capacity as Village Trustee for the Village of Port Chester, GERARD DIROBERTO, individually and in his official capacity as Village Trustee for the Village of Port Chester, ANTHONY NAPOLI, individually and in his official capacity as Village Trustee for the Village of Port Chester, ROBERT SORENSEN, individually and in his official capacity as Village Trustee for the Village of Port Chester, G & S Port Chester, LLC. and Gregory Wasser, Defendants.

04 Civ. 0370 (CM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

304 F. Supp. 2d 548

February 10, 2004, Decided

COUNSEL: For the Board Of Trustees for the Village of Port Chester, Defendant: Stuart Evan Kahan, Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP, White Plains, NY.

For 117 North Main Street Corp., Plaintiff: Richard L. O'Rourke, Keane and Beane P.C., White Plains, NY.

For 117 North Main Street Corp., Plaintiff: Edward J. Phillips, Keane and Beane P.C., White Plains, NY.

For G&S Port Chester, LLC., Defendant: Alan David Scheinkman, DelBello Donnellan Weingarten Tartaglia Wise & Wiederkehr, L., White Plains, NY.

For the Village of Port Chester, Defendant: John Ernest Watkins, Jr., Law Office of John E. Watkins, White Plains, NY.

JUDGES: McMahon, J.

OPINION BY: McMahon

OPINION:

DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

McMahon, J.:

In this action, Plaintiffs Bart Didden, Domenick Bologna, Fred DeCesare, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp. and 117 North Main Street Corp. seek an order staying a condemnation proceeding in state court. For the following reasons, Plaintiffs' motion is denied.

BACKGROUND

This case arises out of a dispute between private developers over a development project associated with the Village of Port Chester's ("Port Chester") redevelopment of 27 acres of its downtown and waterfront area.

The Redevelopment Project

Port Chester had been seeking to redevelop its blighted waterfront and downtown areas since 1977 without success. In April 1998, Defendants G & S Port Chester, LLC. ("G & S"), and its principal, Defendant Gregory Wasser (together, the "Private Defendants") entered into a Land Acquisition and Disposition Agreement ("LADA") with Port Chester which named G & S as the designated developer of the Modified Marina Redevelopment Project (the "Redevelopment Project") in the urban renewal area of Port Chester known as the Marina Redevelopment Project Urban Renewal District (the "MUR District") in April 1998. The agreement called for development of approximately 500,000 square feet of modern retail establishments.

The Project was to be anchored by a Costco Wholesale warehouse store employing more than 150 people. The Project also includes a movie theater, a Marshall's department store, a Designer Shoe warehouse, a Bed, Bath & Beyond, a Michael's Arts & Crafts Store, as well as a Stop & Shop Supermarket. All of these stores are under construction today, employing dozens of union construction workers pursuant to agreements with several major contractors. Upon completion, the Project will offer jobs to more than 1,000 people, produce millions in tax revenues

to Port Chester and the State, and add over 2000 additional parking spaces to downtown Port Chester.

On July 14, 1999, following a public hearing, the Port Chester Board of Trustees (the "Board") adopted a resolution (the "1999 Findings") (1) making a Finding of public purpose for condemnation purposes under Article 2 of the New York State Eminent Domain Procedure Law and (2) approving the LADA and the designation of G & S as "the qualified and eligible redeveloper" for the Project (Affidavit of Greg Wasser ¶ 12 Exh. A.) The 1999 Findings stated that the Project "is designed to revitalize and beautify the Village's long neglected waterfront, eliminate a deteriorating downtown urban blighted area, bring sorely needed jobs to the Village, add to the Village's tax base, and importantly, bring the public back to the Village's downtown and waterfront." (Wasser Aff. ¶ 11 Exh. A.) Notice of the hearing was published pursuant to New York Eminent Domain Procedure Law (the "EDPL") § 202A, which requires the condemnor to publish notice of the hearing in newspapers at least 10, but not more than 30 days before the hearing. Although the EDPL does not require individual notice to the affected property holders, Defendants have attached a copy of the notice of public hearing and copies of signed receipts acknowledging that Plaintiffs received that notice. (Wasser Aff. ¶ 12 Exhs. D & E.) The EDPL allowed affected property owners 30 days after July 14, 1999 to appeal the Board's findings. EDPL § 207. Plaintiffs took no such appeal.

The Redevelopment Project became one of Westchester County's largest and most visible of such endeavors. It was the subject of substantial environmental review, public meetings and widespread publicity.

The Redevelopment Project called for the acquisition of thirty-eight separate properties and the relocation of more than one hundred individual families, most of whom were renting substandard or illegal apartments in deteriorated structures. Fifty-two businesses were also relocated. Lawsuits predictably ensued. G & S reached private settlements with most of the displaced business owners, landowners and residential tenants, and the Condemnation Part of the Supreme Court of Westchester County determined the remaining claims, some after trial.

Due to the Redevelopment Project's size, it has been undertaken in phases. G & S obtained building permits and proceeded with its first phase, which included Costco; it was completed in August 2002. At the same time, Defendants acquired land for subsequent phases and installed millions of dollars of public infrastructure improvements, including the construction of a waterfront park and new sea wall; new water, sanitary and storm sewers; new traffic controls, curbing and lighting and removal of old overhead utility lines.

While the first phase appears to have proceeded apace, the second phase of the Redevelopment Project was significantly delayed due to litigation initiated by various property owners and tenants. Although all cases were eventually decided in favor of Port Chester, the process took nearly two years. At the federal level, property owner William Brody, filed suit in this Court, alleging that the EDPL violated the Due Process Clause of the Fourteenth Amendment, both facially and as applied to him. In January 2001, the district court (Baer, J.) granted Brody's motion for a preliminary injunction, finding that defendants had failed to give Brody notice of the Findings of the Port Chester Board of Trustees or of his statutory right to

appeal the Board's Findings. The injunction halted large portions of the Redevelopment Project, at a significant cost to Defendants, until it was lifted by the Second Circuit on August 8, 2001. *See Brody v. Village of Port Chester,* 261 F.3d 288 (2d Cir.2001) ("*Brody I*"). Port Chester acquired title to Brody's property on August 28, 2001.

At the state court level, several owners challenged Port Chester's request for a writ of assistance pursuant to EDPL § 405(A), thereby preventing Port Chester from condemning their properties. Justice Peter Rosato of the Supreme Court of Westchester County granted Port Chester's writ in all cases. *See e.g., In Matter of Village of Port Chester, Greatest Estate Services of America, Inc.,* 00 No. 64481 (N.Y. Sup.Ct. Weschester Co. March 18, 2002) review of a state court judgment; *In Matter of Village of Port Chester v. Luis Perez, d/b/a Luis Luncheonette,* 00 No. 3793 (N.Y. Sup.Ct. Westchester Co. March 27, 2002); *In Matter of Village of Port Chester Fabio Sorto, d/b/a Rinconcito Salvadoreno,* 00 No. 3793, (N.Y. Sup.Ct. Westchester Co. March 18, 2002). Plaintiffs appealed Justice Rosato's decisions to the Appellate Division, and were granted stays pending appeal of those decisions to the New York Court of Appeals. The stays were entered on March 28, 2002.

Progress on the second phase began again when the stays were lifted after the Court of Appeals dismissed the final three motions for leave to appeal on July 1, 2003. *See In Matter of Village of Port Chester, Greatest Estate Services of America, Inc.,* 100 N.Y.2d 577, 796 N.E.2d 478, 764 N.Y.S.2d 386 (2003); *In Matter of Village of Port Chester v. Luis Perez, d/b/a Luis Luncheonette,* 100 N.Y.2d 577, 796 N.E.2d 478, 764 N.Y.S.2d 386 (2003); *In Matter of Village of Port Chester v. Fabio Sorto, d/b/a Rinconcito*

Salvadoreno, 100 N.Y.2d 577, 796 N.E.2d 478, 764 N.Y.S.2d 386 (2003). Port Chester finally had possession of all the parcels for the second phase by July 11, 2003. (Affidavit of John Watkins ¶ 24.)

Soon thereafter, Port Chester began preparation for phase three of the process, which included the area containing Plaintiffs' property.

In 2002, Private Defendants had publically announced their intention to locate Walgreens, a national drug store chain, in the area of the MUR District commonly referred to as "Retail E." The announcement came after Private Defendants failed to come to terms with CVS Pharmacy, following protected negotiations. (Wasser Aff. ¶ 30, *see below.*) In June 2003, G & S sought amendments to its approved site plan for the MUR District, including "Retail E," in order to accommodate the Walgreens store. (Didden Decl. ¶ 20.) Plaintiffs believed that the site plan was flawed, and planned to comment on the flaws at the next public hearing, scheduled for July 21, 2003. (*Id.* ¶ 21.) At the hearing, G & S announced that it was withdrawing the proposed amendments. (*Id.* ¶ 22.) Port Chester ordered and received updated title reports in August 2003, a map in October 2003, and a metes and bounds description in November 2003. (Watkins Aff. ¶¶ 26-30.) As soon as the metes and bonds description was finalized, Port Chester assembled a Petition to condemn Plaintiffs' property. (*Id* ¶ 31.) The condemnation proceeding was commenced on November 6, 2003.

The CVS Project

Plaintiffs are private developers who own or control various adjoining properties in Port Chester that are

situated in "Retail E" (the "Inside Properties"). In addition to the Inside Properties, Plaintiffs own or control four adjoining properties situated outside the MUR District (the "Outside Properties").

Since at least 1996, Plaintiffs have tried to redevelop both the Inside and Outside Properties as a CVS Pharmacy (the "CVS Project"). CVS showed little interest in the Project until Port Chester adopted the LADA agreement and designed G & S as the developer.

In late 2001, a CVS representative entered into negotiations with a G & S representative to discuss the possibility of locating a CVS entity in the "Retail E" area. (Declaration of Alfred Callegari ¶ 7.) The negotiations resulted in a proposal for development of a CVS store on "Retail E," which CVS ultimately rejected on May 8, 2002 because the size of the "Retail E" area was inadequate (*Id* ¶ 8.)

In March 2003, CVS approached Plaintiffs because the Inside Properties and Outside Properties, both owned by Plaintiffs, were, in combination, sufficiently large to accommodate CVS's spatial requirements. (Callegari Decl. ¶ 9; Declaration of Bart Didden, dated January 15, 2004 ¶ 25.) Plaintiffs secured various municipal approvals for the CVS Project and entered into a long-term lease of the Inside and Outside Properties with CVS. (Callegari Decl. ¶ 10.)

Plaintiffs entered into the CVS lease knowing full well that, under the LADA, the Private Defendants, as the designated developer of all sites within the MUR District (including the Inside Properties), "at some point, [] might attempt to buy or condemn [the Inside Properties]." (1/15/04 Didden Decl. ¶ 26.) As long ago as March 30,

1999, Plaintiffs had sent a letter to the Board (the "March 1999 Letter") stating that G & S's designation as "preferred developer" placed them at a competitive disadvantage in their negotiations with G & S, and asked that Port Chester remove the Inside Properties from the proposed project and site plan approval process. (Wasser Aff. Exh. C.)[1] The letter, which followed-up on comments made by Plaintiffs at a March 19, 1999 public hearing, is here reproduced in its entirety:

> Dear Madam Mayor and Board Members:
>
> We would like to thank the Board for its willingness to listen and take under advisement the public's numerous comments and suggestions regarding the revitalization of the marina district of our village.
>
> We would like to take this opportunity to review the comments of March 18 and formally restate our request for your thoughtful consideration. We have owned the property known as 103-105 North Main Street for six years. Dick has owned and maintained some of the adjacent buildings for more than fifteen years. Approximately three years ago, when CVS was endeavoring to construct a pharmacy in Byram and failed due to opposition by the local residents, we had contact with CVS. We were at that time willing to build to their specifications, but they informed us that they were "not interested in Port Chester."

[1] During the same month, William Brody also sought to exempt his property from the LADA because he wanted to develop it in light of market created by the Redevelopment Project. (Wasser Aff ¶ 27.)

We were willing to develop then. We are still willing to develop and are ready.

At this time, when G & S Investors is proposing a project for the downtown area, we find a synergy surrounding the project which is causing increased interest among many possible tenants, including CVS which formerly had no interest in Port Chester.

As you are aware, we have had a number of meetings in recent months, in the village with G & S and additionally with G & S and Peg/Park, the planners for G & S, in White Plains. These meetings have been promising, but they have borne no fruit. Hence, we find ourselves at a unique disadvantage. *We are anxious to develop our property, but by your actions, we are precluded because of the "preferred developer" status granted by you, the Board, upon G & S Investors with respect to "Retail E". We will continue to negotiate with G & S, but with the designation of "preferred developer", G & S enjoys the ultimate assistance of condemnation for those property owners with whom they are unable to finalize a deal.* (Emphasis added).

To our detriment, with their right to condemnation, G & S is not required or bound to ultimately negotiate in good faith. We have been discussing a proposed partnership whereby we would contribute all of the land necessary for the proposed building known as "Retail E". G & S would build the building and we assume, based on land value vs. construction costs and tenant acquisition, the percentages of ownership would be derived. This is a hypothetical formula and difficult to get agreement on. G & S, which we find open and cooperative to work with, has no urgency in finalizing a

deal with us. They are not required to finalize a deal of this or any nature. They, by a matter of right, may go directly to condemnation and proceed on their way.

We have believed in Port Chester for many years, as evidenced by our investments. Our investments are not limited to just this one site. Besides real estate, our respective primary operating businesses employ many local residents and provide needed services not only to businesses but residents, as well.

Our impression from speaking with various Board members and hearing your comments made at the public meetings, we realize that this project doesn't fully satisfy your individual wishes 100%. Agreed. But just as you do, we want to see a doable project proceed in the village.

Since "Retail E," located on our property, was not included in the original proposal, the removal of our property in no way would hamper the integrity or functionality of the future project. Furthermore, since we still desire to develop the property and would so in concert with the style of the G & S proposal, even if not a partnership with G & S, we request the following action of the Board of Trustees:

To remove the property know as 103-105 North Main Street and the immediately adjoining properties from the proposed project and site plan approval process so that from a level playing field we may negotiate with G & S to a possible partnership.

If a partnership with G & S is not attainable for whatever reason, we are agreeable to commit, in

a binding fashion, to construct a building in accordance with the G & S construction schedule on the site without delay after proceedings through the local approval process. Your fallback position is that at anytime it is deemed that we are not living up to our end of the agreement, you can always rededicate the preferred developer status on this property and move it forward or include the property in phase 2.

Please permit us the opportunity to maintain and fully realize our investment potential without seeking the injunction of the courts to protect our rights of ownership. We would like to explore the possibility of working with G & S and, ultimately, together with local financing and utilizing G & S, construct a building that compliments the entire project and have the ownership remain here in local hands. In our opinion, this course of action would be consistent with what is best for the village. Nobody wants to delay the progress of the village.

As you can see, we all share the same opinions. They may not be the best, but they are doable today.

Yours for a better village,

Domenick Bologna and Bart A. Didden.

In response to the letter, Port Chester declined to grant Plaintiffs' request for removal from the Redevelopment Plan, but urged the parties to convene a meeting to discuss the CVS Project.[2]

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[2] Plaintiffs argue that Port Chester should have exempted their properties because their development proposal of the "Retail E" area

(Continued on following page)

In fact, Plaintiffs and Private Defendants were already well acquainted. Plaintiffs participated in a public hearing convened by Defendants in March 1999. The March 1999 Letter also referred to "a number of meetings in recent months, in the village with G & S and additionally with G & S and Peg/Park, the planners for G & S, in White Plains." (Wasser Aff. Exh. C.) At their first meeting, G & S representative Gregg Wasser informed Plaintiffs that their properties were not part of the first phases of the development, but that before the Project reached their properties they would attempt to reach a fair settlement prior to initiating a condemnation proceeding. (Wasser Aff ¶¶ 24-25.) At another meeting, in 1999, the parties discussed the possibility of initiating a joint venture. (*Id.* ¶ 26.) Plaintiffs describe G & S's conduct at these meetings as "open and cooperative." (March 1999 Letter.)

At the July 21, 2003 public hearing, Plaintiffs voiced their concerns regarding G & S's proposed Walgreens site plan. Rather than engage in further public debate with Plaintiffs, G & S withdrew the amended site plan application and attempted, again, to negotiate with Plaintiffs directly. (Wasser Aff. ¶ 31.)

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was better than Private Defendants' proposal. Whether Plaintiffs are correct or not in their contention is irrelevant. Port Chester was only required to have a rational basis for its decision to take Plaintiffs' property and no more, *see* takings discussion *infra*. In fact, Port Chester disliked Plaintiffs proposal, as Plaintiffs acknowledge in the March 1999 Letter, because its would develop less property in the MUR zone than Private Defendants' plan. Plaintiffs' plan excludes from development Lot 11, a small centrally located vacant lot adjacent to Plaintiffs' properties. (Watkins Aff. ¶¶ 54-57.) The Redevelopment Project includes this lot. (*Id.* ¶ 58.) If Plaintiffs plan were to go forward, Lot 11 would remain undeveloped and isolated from any future development possibility.

At the behest of Port Chester officials, including the Mayor of Port Chester, the parties met again on November 5, 2003.

The parties do not agree on what happened during the meeting. Plaintiffs allege that Private Defendants demanded that Plaintiffs either pay them $800,000 or give them a partnership interest in the project or Private Defendants would cause Port Chester to commence a condemnation proceeding against the Inside Properties and thereby divest Plaintiffs of title. Private Defendants characterize the meeting differently. According to Gregg Wasser, the G & S representative present at the meeting, he and G & S's attorney informed Plaintiffs Didden and Bologna that it would be a waste of time for the lawyers to argue over who had "better" rights to proceed with their project. In lieu of continuing the "rights" debate, Wasser claims to have offered to conduct a joint venture with Plaintiffs on the Retail E property. After Plaintiffs rejected the offer, Wasser determined that the only other way to proceed would be to establish a value for the property and for one side to buy-out the other. Wasser estimated that the profit on the CVS store deal would be $2 million. He then stated to Plaintiffs that whoever would be responsible for completing the Project should be given some credit for the additional work and was entitled to more than a 50-50 split. Based on the $2 million profit figure, Wasser proposed a buy-out figure of $800,000, in addition to the fair market value of the property, to be divided among Plaintiffs Didden, Bologna and DeCesare. He said he would be just as happy being bought out by Plaintiffs at that figure as he would be to buy Plaintiffs out. (Wasser Aff. ¶ 32.) He also informed Plaintiffs that the condemnation process was continuing, and that, if they could not

reach an agreement, G & S expected that Port Chester would acquire the Inside Properties through condemnation.

On November 6, 2003, Port Chester commenced a condemnation proceeding against the Inside Properties in the Westchester County Supreme Court by filing a Notice of Petition and Petition (the "Condemnation Proceeding"). The petition seeks court permission authorizing Port Chester to file an acquisition map with the court and thereby gain title in fee to the Inside Properties pursuant to Article 4 of the EDPL. *See In the Matter of Village of Port Chester to Acquire Title To Certain Real Property Located In the Village of Port Chester, Westchester County, State of New York, and Designated on the Tax Maps of the Village of Port Chester as Section 2, Block 60, Lots 9, 10, 11, 12, 13, 14, 15, 16,* No. 18821/03 (N.Y. Sup.Ct. Westchester Co. filed November 6, 2003).

On November 24, 2003, the Port Chester Planning Commission held a public hearing on Plaintiffs' site plan application for the CVS Project, and granted preliminary site plan approval. (Declaration of Domenick Bologna, dated January 15, 2004 ¶¶ 21-22.) Following receipt of the site plan approval, Plaintiffs attended a meeting of the Board on December 1, 2003, in which they asked the Board to withdraw the pending Condemnation Proceeding. (1/15/04 Bologna Decl. ¶ 23.) On December 3, 2003, the Board held a special meeting to consider Plaintiffs' request. Although the request was denied, Port Chester allowed Plaintiffs additional time to respond to petition. (*Id.* ¶ 24.)

On December 17, 2003, Plaintiffs again petitioned Port Chester to amend the boundary line of the MUR

District to remove the Inside Properties from the district (the "Rezoning Petition"). (*Id.* ¶ 25.) On January 6, 2004, the Board held another special meeting, during which it announced, upon the advice of its special counsel, that it would not act on the Rezoning Petition. (*Id.* ¶ 27.) Instead, it agreed to convene a meeting with the Board's counsel, Plaintiffs and Private Defendants. This meeting occurred on January 12, 2004. (*Id.* ¶ 28.) Private Defendants reiterated their November 5 offer to Plaintiffs at the January 12, 2003 meeting. Plaintiffs did not accept.

The Instant Action

On January 16, 2004, Plaintiffs filed a complaint and an order to show cause with this Court, seeking temporary and preliminary injunctive relief that would stay the Condemnation Proceeding, as well as declaratory and monetary relief pursuant to 42 U.S.C. § 1983 against Port Chester and its Board of Trustees (the "Public Defendants") and Private Defendants. As a first claim for relief, the complaint alleges that Defendants are depriving Plaintiffs of their property without due process in violation of the Fourteenth Amendment. The second claim for relief alleges that Defendants have effected a taking of Plaintiffs' property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. The third claim for relief alleges that Defendants have abused their condemnation powers in violation of Plaintiffs' substantive due process rights under the Fourteenth Amendment. The fourth claim for relief alleges that Plaintiffs have been intentionally and unlawfully singled out and mistreated by Defendants in violation of the Equal Protection Clause. The fifth claim for relief seeks a

declaration that the development agreement (LADA) between Public Defendants and Private Defendants is unconstitutional because it unlawfully delegates Public Defendants' eminent domain power to the Private Defendants. The sixth and seventh claims for relief seek preliminary and permanent injunctive relief as well as attorney's fees.

The crux of Plaintiffs' argument is that the Public and Private Defendants have conspired to deprive Plaintiffs of the use of their property in order to pursue their own private interests – specifically, their development plans with Walgreens – rather than the interests of the public. Plaintiffs ask this Court to enjoin the Condemnation Proceedings.

The Defendants have asked me to abstain from deciding these issues, which they allege are properly before the state court in the Condemnation Proceeding. In lieu of such a ruling, Defendants ask that I deny Plaintiffs' request for a preliminary injunction on the merits.

Following oral arguments on January 16, 2004, I granted Plaintiffs' request for a 10-day temporary restraining order and ordered Plaintiffs to post a $1,000 bond, which they did. On January 23, 3004 [sic], after full briefing and oral arguments, I lifted the TRO and denied Plaintiffs' request to enter a preliminary injunction enjoining the condemnation proceeding. This opinion sets forth the reasons for that decision.

DISCUSSION

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), instructs

federal courts to resolve questions of Article III jurisdiction before reaching the merits of a plaintiff's claim. The doctrine of abstention, however, is equitable, not jurisdictional, in nature. *Schachter v. Whalen,* 581 F.2d 35, 36 n.1 (2d Cir.1978) (per curiam) ("*Younger* abstention goes to the exercise of equity jurisdiction, not to the jurisdiction of the federal district court as such to hear the case"). Therefore, I need not first reach the issue of abstention before deciding whether Plaintiffs are entitled to a preliminary injunction on the merits. *Id.,* at 36. Turning to that dispositive issue first, I find that they are not.

I. Preliminary Injunction

A. Standard of Review

In this Circuit, a preliminary injunction will be granted if the moving party shows that he will suffer irreparable harm absent injunctive relief and *either* (1) that he is likely to succeed on the merits of his claim; or (2) that there are sufficiently serious questions going to the merits to make them fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party. *Wright v. Giuliani,* 230 F.3d 543, 547 (2d Cir.2000); *Fun-Damental Too, Ltd. v. Gemmy Industries Corp.,* 111 F.3d 993, 998-99 (2d Cir.1997). However, where the moving party seeks to enjoin government action taken in the public interest pursuant to a statutory scheme, that party must satisfy the more rigorous "likelihood of success on the merits" standard and may not resort to the lower "fair ground of litigation" test. *See Forest City Daly Hous., Inc. v. Town of N. Hempstead,* 175 F.3d 144, 149 (2d Cir.1999).

I deny Plaintiffs' motion for a preliminary injunction because I find that Plaintiffs cannot establish a likelihood of success on the merits, and that the balance of hardships favors Defendants.

B. Likelihood of Success on the Merits

Plaintiffs have not demonstrated that they are likely to succeed on the merits. Indeed, for the most part it is clear, not only that they are not likely to succeed, but that they cannot possibly succeed.

1. Statute of Limitations Bars Plaintiffs' Constitutional Claims

First, Plaintiffs claims are time-barred. Plaintiffs claims are premised on 42 U.S.C. § 1983. In New York, § 1983 claims are subject to the New York State's 3-year statute of limitations governing general personal injury actions. *Owens v. Okure,* 488 U.S. 235, 251, 102 L.Ed.2d 594, 109 S.Ct. 573 (1989). While state law provides the limitations period, the issue of when the federal cause of action accrued is a matter of federal law. *Fiesel v. Board of Ed. of City of New York,* 675 F.2d 522, 524 (2d Cir.1982). Under federal law, a cause of action under 42 U.S.C. § 1983 accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Barrett v. U.S.,* 689 F.2d 324, 333 (2d Cir.1982), *cert. denied,* 462 U.S. 1131, 77 L.Ed.2d 1366, 103 S.Ct. 3111.

Here, Plaintiffs had reason to know of the basis of their injury as soon as the Board announced its public purpose finding on July 14, 1999. On that date, Port Chester authorized a land disposition agreement with G & S which covered the use of eminent domain incidental to

the implementation of the Redevelopment Project. It found that there was a legitimate public purpose for condemnation as a means of acquiring property for the Project.

Plaintiffs now complain that no public purpose underlies the pending condemnation of their property, and that Port Chester unconstitutionally delegated its condemnation powers to G & S. But the March 30, 1999 letter from Plaintiffs to the Port Chester Board of Trustees, cited above, shows that Plaintiffs were fully aware that such a finding would, if not immediately overturned, expose them to the prospect of condemnation. Plaintiffs do not dispute receipt of the notice of public hearing submitted to the Court by Defendants. This action was commenced on January 16, 2004, nearly five years after Plaintiffs sent their March 30, 1999 letter, and well over four years after the Village issued a public purpose finding and decided to enter into a land disposition agreement with G & S. Therefore, I find that all of Plaintiffs' claims are time-barred.

2. Plaintiffs Were Accorded All the Process They Were Due

In addition, Plaintiffs have no likelihood of success on their due process claims. Procedural due process requires that the Condemnation Proceeding be fair and reasonable and that the government not act arbitrarily or unfairly interfere with Plaintiffs' property rights, *Daniels v. Williams,* 474 U.S. 327, 330, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), while substantive due process restricts the power of the state from regulating in an arbitrary matter. *Natale v. Town of Ridgefield,* 170 F.3d 258, 263 (2d Cir.1999).

Plaintiffs have no claim under either theory. As to procedural due process, Defendants have complied fully and fairly with the EDPL. It was up to Plaintiffs to seek judicial review of Port Chester's Article 2 determination if they so desired. At this point, Plaintiffs remedy is limited to contesting the EDPL Article 4 Petition and making an Article 5 claim for just compensation. And, that is all the process that is due them. *Hellenic American Neighborhood Action Committee v. City of New York,* 101 F.3d 877, 880-881 (2nd Cir.1996). As to substantive due process, the EDPL has been held to meet all constitutional requirements. *See Frooks v. Town of Cortlandt,* 997 F.Supp. 438, 452 (S.D.N.Y. 1998), *aff'd,* 182 F.3d 899 (2d Cir.1999). Thus, Plaintiffs cannot succeed on their due process claims.

3. Plaintiffs' Takings Claim Cannot Succeed

Plaintiffs are not likely to prevail on their takings claim.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, precludes the taking of private property for *public use* without just compensation. *Dolan v. City of Tigard,* 512 U.S. 374, 383-84, 129 L.Ed.2d 304, 114 S.Ct. 2309 & n.5, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Defendants contend that the Redevelopment Project (including the Inside Properties) serves a clear public purpose – the redevelopment of the blighted downtown area of Port Chester. This was specifically recognized by the Second Circuit – whose rulings I am hardly in a position to contravene – when it vacated the *Brody* injunction. *See Brody I,* 261 F.3d at 290-91. The alleged "bribe" by Private Defendants, even if it was a "bad

faith" offer, could not in any way have transformed that public purpose into a private purpose.

Insofar as Plaintiffs argue only that the taking of their property, not the overall Redevelopment Project, is not for a public use, Plaintiffs' arguments are also without merit. As this Court has previously held

> Once a legitimate public purpose for the overall project is conceded . . . the court cannot get involved in parsing the particular degree of public or private motivation behind the inclusion of a particular site in the Project area, so long as that inclusion could rationally be related to the public purpose of the plan as a whole.

Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp., 605 F.Supp. 612 (S.D.N.Y. 1985), *aff'd*, 771 F.2d 44, 45 (2d Cir.1985). Plaintiffs have failed to adduce any evidence that the taking of their property was not rationally related to the purpose of the overall Redevelopment Project.[3] And, under *Berman v. Parker*, 348 U.S. 26, 35-36, 99 L.Ed. 27, 75 S.Ct. 98 (1954), I will not substitute this Court's judgment for that of the municipality as to where the appropriate boundary of the Redevelopment Project should be located.

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[3] Plaintiffs acknowledge that their CVS proposal did not fully satisfy the Board in their March 1999 letter (Wasser Aff. Exh. C). Unlike Plaintiffs' proposal, Private Defendants' proposal includes Lot 11, a vacant lot adjoining Plaintiffs' property that would otherwise be impossible to develop. Thus, it was certainly not *per se* irrational for Port Chester to refuse Plaintiffs request to remove the Inside Properties from the Redevelopment Plan.

Thus, I find that the Plaintiffs have no likelihood of success of showing that the condemnation of the Inside Properties does not serve a public purpose.

4. Plaintiffs Have Waived Their Right to Challenge the Public Purpose of the Redevelopment Project

Even if Plaintiffs could have made a showing of non-public use, it is too late for them to do so now. Port Chester issued its public purpose findings in July 1999. Under the EDPL, Plaintiffs and others were allowed thirty days to challenge the public purpose finding in state court. EDPL § 207. Plaintiffs failed to do so. Plaintiffs do not (and cannot) allege that they failed to receive notice of Port Chester's declaration of public purpose. To allow Plaintiffs to challenge the public purpose of the Redevelopment Project now would contradict the express provisions of the EDPL, and undermine New York's constitutional unitary scheme for the condemnation of property.

5. Rooker-Feldman Bars This Court From Revisiting the Public Purpose Finding

Under the *Rooker-Feldman* doctrine, a federal district court does not have jurisdiction to review a claim that has been previously decided by a prior state court proceeding. *D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 416, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *Phifer v. City of New York,* 289 F.3d 49, 55-56 (2d Cir.2002).

Federal district courts lack subject matter jurisdiction "over cases that effectively seek review of judgments of

state courts." *Phifer,* 289 F.3d at 55. The only means by which a party may seek federal review of a state court judgment is by petitioning the Supreme Court for certiorari. *Id.* Moreover, issues that are directly decided or are "inextricably intertwined" with a state court decision are barred from federal review. *Feldman,* 460 U.S. at 486-87, 103 S.Ct. 1303. *Rooker-Feldman* extends to lower state court judgments. *Campbell v. Greisberger,* 80 F.3d 703, 707 (2d Cir.1996). Claims are "inextricably intertwined" when entertaining the second action would allow the party to "collaterally attack" the state court decision. The Second Circuit has stated that:

> the Supreme Court's use of "inextricably intertwined" means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding (as either the plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion.

Moccio v. New York State Office of Court Admin., 95 F.3d 195, 199-200 (2d Cir.1996).

However, even if res judicata or collateral estoppel do not preclude the second suit, the *Rooker-Feldman* doctrine still may prevent maintenance of a federal action if "the litigant in federal court seeks relief that would effectively void or reverse a related state court ruling." *Wanderlust Pictures, Inc. v. Empire Entertainment Group,* 2001 U.S. Dist. LEXIS 10196, No. 01 CV 4465, 2001 WL 826095, at *3 (S.D.N.Y. July 19, 2001).

Under principles of collateral estoppel, Plaintiffs' takings claim will be barred if "(1) the issue in question

was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." *Moccio,* 95 F.3d, at 200 (quoting *Colon v. Coughlin,* 58 F.3d 865, 869 (2d Cir.1995)). Both elements are present here. First, that the Redevelopment Project constituted a "public purpose" was actually and necessarily determined during the Article 2 phase of the Condemnation Proceedings in July 1999. Second, EDPL § 207 provided Plaintiffs with a full and fair opportunity to litigate the issue of public purpose in state court; indeed, under the EDPL, it was Plaintiffs' only provided forum for litigating the issue.

Additionally, the Article 2 "public purpose" determination was the predicate for numerous other individual judgments and court approved settlements previously reached between Port Chester and other lot owners in the MUR District pursuant to Article 4 in the Condemnation Proceeding. *See e.g., In Matter of Village of Port Chester, Greatest Estate Services of America, Inc.,* 00 No. 64481 (N.Y. Sup.Ct. Weschester Co. March 18, 2002); *In Matter of Village of Port Chester v. Luis Perez, d/b/a Luis Luncheonette,* 00 No. 3793 (N.Y. Sup.Ct. Westchester Co. March 27, 2002); *In Matter of Village of Port Chester v. Fabio Sorto, d/b/a Rinconcito Salvadoreno,* 00 No. 3793, (N.Y. Sup.Ct. Westchester Co. March 18, 2002). Each of these decisions, have been affirmed by the New York State Appellate Division with leave to appeal denied by the New York State Court of Appeals. *In Matter of Village of Port Chester, Greatest Estate Services of America, Inc.,* 303 A.D.2d 416, 755 N.Y.S.2d 862 (N.Y. App. Div. 2003); *In Matter of Village of Port Chester v. Luis Perez, d/b/a Luis Luncheonette,* 303 A.D.2d 416, 755 N.Y.S.2d 861 (N.Y. App.

Div. 2003); *In Matter of Village of Port Chester v. Fabio Sorto, d/b/a Rinconcito Salvadoreno,* 303 A.D.2d 416, 755 N.Y.S.2d 860 (N.Y. App. Div. 2003).

Were I to rule now that Private Defendants' actions had somehow transformed the public purpose of the Redevelopment Project into a private one, it would have the effect of undermining or voiding all of those prior state court rulings. This is precisely the situation that the *Rooker-Feldman* doctrine was intended to avoid. Thus, Plaintiffs' Takings Claim is also likely to be barred by *Rooker-Feldman*.

6. Plaintiffs' Equal Protection Claim Will Not Succeed

Plaintiffs are not likely to succeed on their Equal Protection claim.

To establish an Equal Protection violation, Plaintiffs must show that (1) compared with others similarly situated, they were selectively treated and (2) they were singled out for such disparate treatment as a result of a malicious or bad faith intent to injure them. *Crowley v. Courville,* 76 F.3d 47, 52-53 (2d Cir.1996).

Plaintiffs' property was a part of the EDPL Article 2 determination, which includes 37 other lots. Plaintiffs, like all other condemnees, had the chance to challenge the Article 2 determination. Like all others, they have the opportunity to contest Port Chester's Petition seeking an order and judgment permitting the filing of the acquisition map as to their parcel and the vesting of title in Port Chester under Article 4 of the EDPL. Like all other condemnees, Plaintiffs are entitled to be compensated under

Article 5 of the EDPL and can always make a claim within the time frame specified by the Supreme Court in the Notice of Acquisition. Finally, because Articles 3, 4 and 5 require resolution on a case-by-case/lot-by-lot basis, there is no requirement that all condemnees receive the same value for their property, so it is unlikely that Plaintiffs will be able to show disparate treatment based on the amount of compensation they receive for the Inside Properties.

7. No Unlawful Delegation

Plaintiffs are unlikely to succeed on their claim that the LADA is unconstitutional because it unlawfully delegates Public Defendants' eminent domain power to the Private Defendants.

Plaintiffs argue that the terms and conditions of the LADA are such that Port Chester has essentially handed-over its condemnation authority to G&S. If true, this would contravene the well-settled rule that a State cannot delegate its power of eminent domain to a private party. *See Contributors to Pennsylvania Hospital v. City of Philadelphia,* 245 U.S. 20, 23-24, 38 S. Ct. 35, 36, 62 L. Ed. 124 (1917) (citations omitted); *see also Kaufmann's Carousel, Inc. v. City of Syracuse Industrial Development Agency,* 301 A.D.2d 292, 750 N.Y.S.2d 212 (4th Dep't 2002), *leave to appeal denied,* 99 N.Y.2d 508, 757 N.Y.S.2d 819, 787 N.E.2d 1165 (2003).

But Plaintiffs have been aware of the terms of the LADA for quite some time. The LADA was adopted in 1999. EDPL created a mechanism for Plaintiffs to challenge LADA as being overly beneficial to Private Defendants at that time. Having made the determination not to challenge it then, they cannot now come to this Court to do

so now, when the Redevelopment Project has moved forward at great expense to both Public and Private Defendants.

C. Balance of the Equities

Even if there were serious questions going to the merits of Plaintiffs' federal claims-which there are not-the balance of the equities tips decidedly in favor of Defendants.

The Second Circuit has held that

> Whenever a request for a preliminary injunction implicates public interests a court should give some consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief. Otherwise a claim that appears meritorious at a preliminary stage but is ultimately determined to be unsuccessful will have precipitated court action that might needlessly have injured the public interest.

Brody I, 261 F.3d 288, 290 (2d Cir.2001) (quoting *Time Warner Cable v. Bloomberg, L.P.,* 118 F.3d 917, 929 (2d Cir.1997)). Here, as in *Brody I,* it is unquestionable that were I to enjoin the Condemnation Proceeding, Defendants and the public in general would suffer substantially greater harm than Plaintiffs would suffer if I were to allow the Condemnation Proceeding to proceed.

First, Defendants are already well on their way to completing the second phase of the Redevelopment Project, consisting of approximately 300,000 square feet of national credit retail. An injunction, and the resulting

delay caused by continuing litigation, would jeopardize all of the leases with the national tenants which Defendants would use to obtain credit to finance the construction of the next phase of the development. (Wasser Aff. ¶ 40.) Defendants assert without contradiction that loses [sic] from such delay could total in the tens of millions of dollars. (*Id.*) Second, Defendants have borrowed more than $120 million to date, which is partially secured by mortgages on the Redevelopment Project land. These loans are to be repaid out of the rent proceeds received from tenants upon the completion of the Project. These tenants include several major national retail establishments. The rent roll for the next phase of the Project, due to be completed in Fall 2004, exceeds $7 million per annum ($600,000 per month). (*Id.* P. 41.) A loss of even a few months rent therefore amounts to millions of dollars. Third, Port Chester is due to receive more than $1.5 million per year in new tax revenue from the Redevelopment Project. Further delay in the Project would therefore hamper Port Chester's ability to allocate this revenue to needed services. The last time the Redevelopment Project was halted by litigation, in 2002, it cost both Port Chester and G&S millions of dollars. There is no doubt that the same result would occur here if I were to grant Plaintiffs' request.

By contrast, it is unclear that Plaintiffs would suffer any harm were I to deny their request for an injunction. Plaintiffs argue that they will be harmed by the violation of their constitutional rights, the unlawful taking of their property and the loss of a unique investment opportunity. To the extent that Plaintiffs have allegedly suffered constitutional harms due to the nature of the Condemnation, the time for them to raise these issues was during the Article 2 proceeding. To the extent that Plaintiffs will

allegedly suffer monetary harm for the taking of their property and the loss of an investment opportunity, Plaintiffs can address those concerns in the Article 5 proceeding. They have a constitutional right to just compensation and there is no reason to believe that just compensation will not be paid.

As discussed above, the long history of this Redevelopment Project and the litigation surrounding it, as well of the course of dealing between the parties, indicate to me that this dispute is really nothing more than a local land use matter, which can and should be resolved by the state court. *Eddystone Equipment and Rental Corp. v. Redevelopment Authority of the County of Delaware*, 1988 U.S. Dist. LEXIS 4577 (1988 WL 52082, at *1, *aff'd*, 862 F.2d 307 (3d Cir.1988)) ("an injunction would require federal court involvement in local land use decision-making, a result never intended by Congress in enacting § 1983 . . . The essentially local character of this dispute and the availability of constitutional remedies in state court argue strongly against federal intervention, although the action is cast as a civil rights violation").

II. Abstention

Although I have denied Plaintiffs' preliminary injunction motion because Plaintiffs are unlikely to succeed on the merits, I note that *Younger* abstention also weighs in favor of denying Plaintiffs the remedy they seek.

A. Standard of Review

In *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court established the principle that federal courts generally should not enjoin or

interfere with ongoing state court proceedings. *Younger* held, specifically, that a federal court may not enjoin pending state court criminal proceedings absent bad faith, harassment or other unusual circumstances calling for equitable relief.

In *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), the Court extended the reasoning of *Younger* to state administrative proceedings. *Middlesex* invoked a three-prong test for abstention in non-criminal proceedings: (1) whether the administrative proceedings constitute ongoing state judicial proceedings; (2) whether the state proceedings implicate important state interests; and (3) whether state procedures are available that allow the plaintiff to raise his federal claim in state court. *Middlesex,* 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). An affirmative finding of all three factors compels a district court to abstain unless the state proceeding was commenced in bad faith or was filed for the purpose of harassing the plaintiff, or if other unusual circumstances warrant the court's intervention. *Middlesex,* 457 U.S. at 435, 102 S.Ct. at 2523.

A district court should not abstain "where a prosecution or proceeding has been brought to retaliate for or to deter constitutionally protected conduct, or where a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass." *Cullen v. Fliegner,* 18 F.3d 96, 103-04 (2d Cir.1994), *cert. denied sub nom.,* 513 U.S. 985, 115 S.Ct. 480, 130 L.Ed.2d 393 (1994). "In such cases, a showing of retaliatory or bad faith prosecution establishes irreparable injury for the purposes of the *Younger* doctrine, and the expectations for success of the party

bringing the action need not be relevant." *Id.* (citations omitted).

In this case, the state Condemnation Proceeding, which commenced on November 6, 2003, two months before this action was filed, is an ongoing state judicial proceedings. And the pending Condemnation Proceeding implicates important state interests. In fact, this Court has previously found that New York eminent domain proceedings always satisfy the first two prongs of *Younger*. *Broadway 41st Street Realty Corp. v. The New York State Urban Development Corp.*, 733 F.Supp. 735, 740-742 (S.D.N.Y.1990). Accordingly, Plaintiffs' only basis for federal intervention is that (1) they have not had an adequate opportunity to raise their federal claims in the Condemnation Proceeding; and/or (2) that the Condemnation Proceeding was commenced in bad faith.

B. Younger Abstention

1. Adequate Opportunity in State Court

A district court will abstain from exercising jurisdiction over a state action if the state action provides the plaintiff with an adequate opportunity to raise its constitutional claims. *Middlesex County*, 457 U.S. at 432, 102 S.Ct. at 2521.

Plaintiffs' argument hinges on whether the New York EDPL provides an adequate mechanism for addressing Plaintiffs federal constitutional claims. It does.

The purpose of the EDPL is to regulate the procedure for condemnation of private property. The EDPL sets forth a staged process for addressing the various issues that arise during a condemnation-each stage being the subject

of its own section (article) of the EDPL. However, as Judge Leisure recognized in *Broadway 41st Street Realty Corp.*, the five stages of EDPL constitute a single, unitary proceeding. *Broadway 41st Street Realty Corp.*, 733 F.Supp. at 743.

The Article 2 phase conclusively determines the need and location of a public project. Article 2 requires the condemnor of a property to conduct the public hearing upon public notice. EDPL §§ 202-203. Following the public hearing, the condemnor must issue a determination and findings, which must be published. EDPL § 204. Aggrieved persons may then seek judicial review in the Appellate Division by filing a petition within thirty (30) days after the completion and publication of the determination and finding. EDPL § 207.

The scope of review under EDPL § 207 includes whether (1) the proceeding was in conformity with the federal and state constitutions; (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority; (3) the condemnor's determination and findings were made in accordance with the statutory procedures; and (4) *and the public use, benefit or purpose will be served by the proposed acquisition.* EDPL § 207(c) (emphasis added). Later judicial review is precluded as to "any matter which was or could have been determined" by the Appellate Division, including a non-public use claim. EDPL § 208.

Article 3 of the EDPL controls the making of compensation offers for property that has been forced to be subject to condemnation for a public purpose. The preamble to Article 3 states that the public policy of New York favors

negotiated settlements. EDPL § 301. However, the condemnor

> fulfills[ ] the requirements of EDPL § 303 by making an offer to respondent property owners that 'it believes to represent just compensation for the real property to be acquired.' There is no requirement that petitioner 'plead or prove, as a prerequisite to the acquisition of property by eminent domain, that it negotiated in good faith with the [property] owner[s].'

National Fuel Gas Supply Corp. v. Town of Concord, 299 A.D.2d 898, 899, 752 N.Y.S.2d 187, 189 (3d Dep't. 2002); *Matter of County of Tompkins,* 237 A.D.2d 667, 669-70, 654 N.Y.S.2d 849, 851 (3d Dep't. 1997). "If a property owner believes that an offer is inadequate, the remedy is to commence an action in the Court of Claims pursuant to EDPL article 5." *Town of Concord,* 299 A.D.2d at 899, 752 N.Y.S.2d at 189.

Following an Article 2 determination and finding and an Article 3 negotiation or offer, the condemnor may commence proceedings to acquire the necessary property under Article 4. EDPL § 401. Article 4 proceedings are commenced when a petition is filed in the Supreme Court, served by registered or certified mail upon property owners and published. The petition must allege compliance with the provisions of Article 2; it need not allege compliance with Article 3. EDPL § 402; *see also Matter of Consolidated Edison Co. of New York, Inc.,* 143 A.D.2d 1012, 1013, 533 N.Y.S.2d 591, 592 (2d Dep't. 1988) (denying leave to amend answer under Article 4 because compliance with article 3 of the EDPL was not a constitutional prerequisite to the acquisition of the respondent's property pursuant to Article 4 of the EDPL). Property owners are

permitted to appear and interpose a verified answer, which must specifically deny each material allegation controverted by the owners, and which may allege "new matters constituting a defense to the proceeding." The Court may grant the petition upon "proof to its satisfaction" that the procedural requirements of the law have been met. EDPL § 402(b)(5). Thus, Article 4 effects the taking of the property. If, after title passes, the amount to be paid for the property remains in dispute, compensation is adjudicated in the Court of Claims pursuant to Article 5.

Plaintiffs argue that, because the Condemnation Proceeding is now at the Article 4 stage, and because Article 4 does not allow a state court to consider non-procedural issues, including constitutional claims, Plaintiffs were precluded from raising in state court their claim that their property is being taken for a non-public purpose.

That is true, but of no moment. Plaintiffs allege that Private Defendants have somehow commandeered the condemnation proceedings and subverted them for private rather than public benefit. But, Port Chester's findings and determination of July 14, 1999 under Article 2 stated that the Redevelopment Project constituted a "public use." (Wasser Aff. Exh. A.) Plaintiffs, who were in negotiation with CVS as long ago as 1996 (and whose letter of March 30, 1999 indicates a renewed interest in the area by CVS), could have appealed Port Chester's July 14, 1999 determination within 30 days as required by EDPL § 207. That was the moment to argue that the LADA unduly favored Defendants purely private interests. Indeed, because I am required to "view[] the state court condemnation proceedings as one unified judicial proceeding which fully provides plaintiffs with the opportunity to raise their federal constitutional claims, albeit at different stages in the

proceedings," *Broadway 41st St. Realty Corp.*, 733 F.Supp. at 743, I am constrained to conclude that Port Chester's "public use" determination under Article 2 is "part" of the ongoing Condemnation Proceedings, and that Plaintiffs had adequate opportunity to raise their concerns regarding the alleged "private use" of the Redevelopment Project in state court at the appropriate time in those proceedings. They chose not to do so. They cannot complain about it now.

Plaintiffs argue that Private Defendants showed their true color by attempting to coerce $800,000 from Plaintiffs as a condition of allowing them to develop the Inside Properties with CVS. They suggest that until the last few months they could not have known that the Private Defendants were acting for a private benefit-or more accurately, that they head turned from public benefit actors to private benefit actors. But the Private Defendants efforts to negotiate some sort of resolution with Plaintiffs that would accommodate both parties' economic interests does not retroactively transform the purpose of the Redevelopment Project (or any portion of it) from public to private. It merely recognizes that, as with so many things in life, whether something is fair or not is all a matter of money.

Brody v. Village of Port Chester, 345 F.3d 103 (2d Cir.2003) ("*Brody II*"), cited by Plaintiffs in support of their arguments, does not auger a contrary result. In *Brody II,* the Second Circuit considered an appeal on an action brought by property owner William Brody against Port Chester for failing to provide him notice of the public hearing regarding condemnation of his commercial property in connection with the same redevelopment project that is at issue in this case. The Court of Appeals found

that Brody had standing to assert his due process challenge in federal court because his constitutional claims could only have been raised in an Article 2 EDPL proceeding, not under Article 4, and the Article 2 phase was long since past. *Id.,* at 114-116. But, *Brody II* applies only where the property owner had no notice of the Article 2 findings, and therefore no opportunity to challenge them in a timely fashion. No such allegation has been made here. Indeed, as noted above, Defendants attach to their submissions a copy of the Public Notice for the July 14, 1999 public hearing that was sent to Plaintiffs along with signed return receipts acknowledging that Plaintiffs had received the Notice. (Wasser Aff. Exhs. D & E.) In their March 1999 Letter, Plaintiffs evidenced full awareness of what was going on in terms of the Redevelopment Project and the LADA. They even acknowledged that their properties were subject to condemnation. Thus, Plaintiffs clearly had the opportunity to raise their concerns about the "private" nature of the redevelopment within 30 days of the issuance of the "public use" finding-nearly five years ago.

Plaintiffs protest that they have no issue with the Redevelopment Project itself or with Port Chester's July 14, 1999 finding of public use. Rather, Plaintiffs argue that the problem is with the LADA because it "provides Private Defendants with an unlawful degree of control over the Village's exercise of eminent domain power" (Pl. Reply Brief at 11) and that, as a result, "the Condemnation Proceeding has been and continues to be used as a club by the Private Defendants in an effort to steal a piece of the CVS Project" (Pl. Reply Brief, at 14.) But, the time for Plaintiffs to object to LADA on the ground that it provided a private rather than a public benefit (the real thrust of

their argument) was during the Article 2 proceedings, of which they were given fair notice. That time has long since passed. Plaintiffs are barred from raising the issue.

Nor can Plaintiffs argue that the taking of the Inside Properties specifically is not within the ambit of the Redevelopment Project's public purpose. As discussed above, that claim is barred by *Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp.*, 605 F.Supp. 612 (S.D.N.Y.1985), *aff'd*, 771 F.2d 44, 45 (2d Cir.1985). Having conceded, as they must, that the implementation of the Redevelopment Project was for a public purpose, Plaintiffs, in seeking federal intervention, are now limited to showing that the inclusion of the Inside Properties in the overall redevelopment scheme was not rationally related to the public purpose of the plan as a whole. No such showing has been made on the record before me.

Plaintiffs thus had adequate opportunity to raise their federal claims in state court.

2. Bad Faith

Plaintiffs next argue that I should intervene in the Condemnation Proceeding because it was brought in bad faith. *See Broadway*, 733 F.Supp. at 744 ("A federal district court should not abstain from interfering with state court proceedings if those proceedings have been brought in bad faith"). Plaintiffs allege that Private Defendants used the LADA to pressure Plaintiffs to pay them $800,000 in order to avoid the condemnation of their property, or alternatively, to gain a portion of the profits from Plaintiffs' CVS Project, and that Public Defendants initiated the Condemnation Proceeding solely in retaliation for Plaintiffs' refusal to pay the $800,000 to Private Defendants. Defendants

counter that the $800,000 figure was an estimate of what it believed, when combined with the fair market value of the Inside Properties, to represent a fair valuation of the total value of the Inside Properties, including Plaintiffs' expected profit from CVS Project. Private Defendants proposed that either side could buy-out the other for this amount.

The Second Circuit generally requires that a district court hold a full evidentiary hearing on factual disputes before making credibility findings on the issue of bad faith. *See Kern v. Clark,* 331 F.3d 9, 12 (2d Cir.2003). In *Kern,* however, the district court erred by failing to address the plaintiff's evidence that defendants "repeatedly and vigorously prosecuted weak cases against him at the behest of politically-connected complainants," which was precisely the basis of plaintiff's bad faith claim. *Id.* Here, however, the parties' factual disputes (which are really disputes about the meaning of certain words that everyone agrees were said) are immaterial to the question of bad faith. The bad faith argument is, therefore, inadequate as a matter of law.

Undermining Plaintiffs' suggestion of bad faith is the simple fact that Defendants had *no obligation whatsoever to negotiate,* in good faith or otherwise, with Plaintiffs. They merely had the obligation to offer Plaintiffs just compensation prior to acquiring title to their property pursuant to the EDPL. And, the offer is not the last word on the subject; determination of the adequacy of compensation is a matter that can be raised in state court during the Article 5 proceedings.

The same holds true for any claim that the Article 4 phase of condemnation, as to the Inside Properties, was

initiated in bad faith. Plaintiffs rely on *Gubitosi v. Kapica,* 895 F.Supp. 58 (S.D.N.Y.1995) and *Brooklyn Institute of Arts and Sciences v. City of New York,* 64 F.Supp.2d 184, 196 (E.D.N.Y.1999) ("*Brooklyn Institute*"). In *Gubitosi,* this Court found that allegations of bad faith were sufficient to avoid abstention where "the basic thrust of [plaintiff's] complaint is that the entire proceedings were initiated to retaliate against constitutionally protected conduct." *Gubitosi,* 895 F.Supp. at 62. In *Brooklyn Institute,* the court refused to abstain where it found that a state court action by New York City "was conceived and initiated as an instrument to pressure the Museum and to compel it to . . . remove specific objectionable works . . . and it is part of an ongoing effort to retaliate against and deter plaintiff's exercise of *First Amendment* rights." *Brooklyn Institute,* 64 F.Supp.2d at 196.

Here, as noted above, the Condemnation Proceeding is one unified judicial proceeding. It began at the Article 2 phase, back in July 1999. As a result of those Article 2 determinations, which cannot now be judicially challenged, Plaintiffs' property (and all other properties within the MUR District) has been found to be subject to condemnation for a public purpose. Plaintiffs have not suggested that the proceeding was commenced in bad faith at that time. Nor does the record support such a finding. Plaintiffs have had numerous opportunities to voice their concerns at public hearings and Defendants made repeated efforts to negotiate with Plaintiffs. It is clear that, even prior to the start of the Redevelopment Project, Defendants went out of their way to ensure that Plaintiffs' requests received a fair hearing.

Neither does the fact that, "For more than four years after the 1999 approval of the MMRP, G&S expressed no

interest and took no action with respect to the properties comprising Retail E" have any bearing on Port Chester's right to initiate a condemnation proceeding against Plaintiffs' properties. Even if true, this fact could not have led Plaintiffs to assume that the public purpose of the Redevelopment Project had been abandoned as to their properties. (1/15/04 Bologna Decl. ¶ 16; *see also* Declaration of Bart Didden, dated January 15, 2004 ¶ 26.) Plaintiffs should have known, as a matter of law, and did know, as a matter of fact, (1/15/04 Didden Decl. ¶ 26), that Defendants had the right to initiate the phase three proceeding at any point within 10 years of the commencement of the Condemnation Proceeding before it would be considered abandoned. *250 West 41st Street Realty Corp. v. New York State Urban Development Corp.*, 277 A.D.2d 47, 47-48, 715 N.Y.S.2d 407, 408 (1st Dep't. 2000), *leave to appeal denied,* 96 N.Y.2d 705, 746 N.E.2d 187, 723 N.Y.S.2d 132 (2001).

Plaintiffs' argument is disingenuous for still another reason. Until the summer of 2003, between the Brody injunction and the stay entered by the Appellate Division, the earlier stages of the Redevelopment Project were at a standstill. It is only in the last six or seven months that Defendants have been free to turn their attention to the next phase of the Project. That the next phase would involve Plaintiffs' properties was signaled by the Walgreens' announcement, which was made in 2002. And, the preparations to condemn the Inside Properties clearly began well before November 5, 2003. On this record, it is impossible to infer bad faith commencement of proceedings.

Finally, Plaintiffs argue that *Aaron v. Target Corp.*, 269 F.Supp.2d 1162 (E.D.Mo.2003) counsels against

abstention in this instance. Target Corp. involves facts that are similar, but not identical, to those facing me today. In *Target,* property owners brought an action under § 1983 against Target Corp., the City of St. Louis and the Land Clearance Redevelopment Authority of the City of St. Louis ("LCRA"), seeking to enjoin state condemnation proceedings on the allegation that their property was being taken for private rather than public use in violation of their constitutional rights under the *Fifth Amendment.* The district court found that abstention was not justified because the first and third prongs of *Younger* were not met. In addition, the court found that the bad faith exception applied based on the following:

> Plaintiffs have presented evidence that the state court condemnation action is not the product of a legitimate legislative or municipal finding of blight, but rather is the result of LCRA and the City allowing Target to usurp the municipal process and power necessary to find the Properties subject to condemnation, in order to take plaintiffs' Properties for Target's own private purpose. Plaintiffs presented evidence that (1) Target proposed a renegotiation of the Trust-Target Lease, but did not attempt to address the issue further after receiving Trust Plaintiffs' counterproposal; (2) Target told the City it might abandon the Properties because it had been unable to reach an agreement with plaintiffs as to a sale price, although no discussions ever took place between Target and plaintiffs concerning a possible sale of the Properties; (3) Target authored the Blighting Study, or at least the critical part of it finding that the Properties were blighted or insanitary; (4) without plaintiffs' knowledge, Target presented a redevelopment plan for the Properties, under which it would be

> the redeveloper; and (5) plaintiffs received no notice of the hearing before the Board of Aldermen on November 30, 2002, at which the Board considered declaring the Properties blighted, approving Target's proposed redevelopment plan, and authorizing LCRA to acquire the Properties through the exercise of eminent domain, because the City mailed notice of this hearing to Trust Plaintiffs "in care of Target" at its Minneapolis headquarters and Target apparently failed to forward the notice.

Target Corp., 269 F.Supp.2d, at 1172. Thus, *Target Corp.* involved a situation where the private entity surreptitiously manipulated a locality's eminent domain procedure from its inception solely to take ownership in the building it was leasing for the purpose of building a new Target store on the site. *Id.*, at 1165.

The same simply cannot be said about this case. Because local eminent domain procedures differ materially among jurisdictions, the Missouri court's decision in *Target Corp.* has limited precedential value for this Court's evaluation of Plaintiffs' bad faith claim under the EDPL. Nevertheless, even assuming for present purposes that *Target Corp.* were relevant, it is easily distinguishable. First, unlike in *Target Corp.*, the Redevelopment Project involves a huge redevelopment comprised of some 27 acres of Port Chester's downtown and waterfront, provides for the construction of over 500,000 square feet of retail space, and includes only about 0.5 acres of Plaintiffs' property (about 2% of the MUR District). (1/15/04 Bologna Decl. ¶¶ 11, 15.) Due to the substantial size of the Redevelopment Project, the development plan and the LADA have been well publicized, and were discussed at frequent public hearings prior to its adoption. Plaintiffs attended at

least some of those hearings, and have not contested that they at least knew about the July 1999 hearing, during which the public use determination was made. Second, unlike in *Target Corp.*, Defendants have tried on numerous occasions to negotiate with Plaintiffs. Lastly, unlike in *Target Corp.*, there is no evidence in the record of any threat or other coercive action by Private Defendants to abandon the Redevelopment Project if Port Chester refused to exercise its eminent domain power over Plaintiffs' property.

Because the Constitution bars only taking for a public purpose without just compensation, Defendants are obligated to do no more than pay a reasonable sum for the Inside Properties. Plaintiffs' allegations of bad faith in this matter are insufficient to warrant an evidentiary hearing or the granting of a preliminary injunction staying the state court proceedings. Plaintiffs therefore have no right to have their property exempted from the Project so that they can develop it privately.

For the foregoing reasons, I deny Plaintiffs' Motion for a Preliminary Injunction enjoining the prosecution of the EDPL Article 4 proceeding relating to Plaintiffs' Inside Properties in the New York State Supreme Court.

The Clerk of the Court is ordered to extinguish the bond.

Dated: February 10, 2004

APPENDIX D – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 9, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:

Docket Number:	04-3485-cv
Short Title:	Didden v. The Village of Port Chester
DC Docket Number:	04-cv-370
DC:	SDNY (WHITE PLAINS)
DC Judge:	Honorable Colleen McMahon

(Filed Aug. 9, 2006)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of Aug. two thousand six.

Bart Didden, Domenick Bologna, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp., 117 North Main Street Corp,

Plaintiff-Appellants,

Fred DeCesare,

Plaintiff,

v.

The Village of Port Chester, The Board of Trustees for the Village of Port Chester, Peter J. Ciccone, individually and

In his official capacity as Village Trustee for the Village of Port Chester, Daniel Colangelo Jr., Individually and In his official capacity as village Trustee for the Village of Port Chester, Gerald Logan, Individually and In his official capacity as Mayor of the Village of Port Chester, John M. Crane, Individually and In his official capacity as Village Trustee for the Village of Port Chester, Gerard Diroberto, Individually and In his official capacity as Village Trustee for the Village of Port Chester, Anthony Napoli, Individually and In his official capacity as Village Trustee for the Village of Port Chester, Robert Sorensen, Individually and In his official capacity as Village Trustee for the Village of Port Chester, G&S Port Chester, LLC., Gregory Wasser,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Bart Didden, Domenick Bologna, Cabernet 119 Realty Corp., Opus 113 Corp., Pauillac 115 Realty Corp., 117 North Main Street Corp. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie,
Clerk

By: /s/ [Illegible] Heller
Motion Staff Attorney

APPENDIX E - FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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(6)

No. 06-652

FILED
DEC 26 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BART DIDDEN, *et al.*,

Petitioners,

v.

VILLAGE OF PORT CHESTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTION

Respondents respectfully submit this Supplemental Brief to respond to new issues raised in the Amicus Curiae briefs of Law Professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossof and Ilya Somin (the "Law Professors") and the Pacific Legal Foundation ("PLF") which were received after the submission of Respondents' Opposition to the Petition.

The Law Professors claim that Petitioners' suit was timely filed. However, this issue is not properly before this Court as Petitioners did not include in their Questions Presented any question relating to this ground for dismissal.[1] In reviewing the Second Circuit's decision, it is clear that the Second Circuit dismissed the entire lawsuit. Even if Amici, or Petitioners themselves, believe that the dismissal was improper, they have not asked this Court to review the correctness of the dismissal.

In any event, Petitioners' March 30, 1999 letter to the Village of Port Chester Board of Trustees demonstrates that Petitioners were fully aware that a finding of public purpose – and the concomitant authorization for the commencement of condemnation proceedings – would expose their property to condemnation. Indeed, that was the very reason that Petitioners wrote to the Village Board, urging it remove their properties from the project area.

The Law Professors' argument that Petitioners' claim was not ripe until the filing of a petition for the acquisition of real property in state court was not raised by Petitioners in the lower courts. Moreover, under New York law, condemnation proceedings begin with the holding of public hearings on whether there is a public purpose to the proposed condemnation, not the filing of a petition in state court (which only comes after the condemning authority has adopted a determination and findings). Therefore, Petitioners' right to challenge the public use determination ripened on July 14,

---

1. The Law Professors, like the Petitioners, do not contest the district court's finding that this action should be dismissed on the ground of waiver. Accordingly, even if this Court were to reach the statue of limitations issue, waiver would still present a bar to the consideration of the merits of the Petition.

1999, when the Village adopted its Determination and Findings, which explains why Petitioners did not raise this claim themselves.

The Law Professors' contention that the Village's condemnation of Petitioners' properties was "pretextual" reflects their lack of familiarity with the record. This issue was not raised below, undoubtedly because Petitioners have never disputed the underlying findings by the Village that the area in question was blighted. Petitioners conceded before the district court that they had no problem with the project *per se* or with the July 14, 1999 finding of public use. Petitioners' claim was not that the project lacked a valid public purpose; rather, they sought to have their properties carved out of the project area.

PLF's claim that Petitioners "were ordered, as a condition of maintaining their property rights, to give up $800,000", Brief of Amicus Curiae PLF at 7, is baseless. Petitioners failed to timely challenge the public use determination, and consequently had no additional substantive rights other than to receive just compensation from the Village pursuant to Articles 3, 4, and 5 of the EDPL. Nor can it be said that the settlement offer, made by the private developer, constituted an "order" since Petitioners were not coerced into doing anything and had the right to refuse the offer and retain all of their "rights".[2]

I. Because This Action Was Dismissed As Time-barred And As Waived, And Petitioners Have Not Sought Review Of Those Grounds For Dismissal, This Court Should Not Consider Amici's Constitutional Arguments

A. Petitioners Knew Their Properties Could Be Condemned.

According to the Law Professors, "the Petitioners at [the time the Village entered its Determination and Findings] had no inkling of Greg Wasser's extortionate demands, which were only made four years later, in November 2003." Brief of Amicus Curiae Law Professors, at 15. The Law Professors posit that

2. Respondents respectfully refer the Court to their Opposition to Petition wherein Respondents present the Questions Presented, Jurisdictional Statement, and Statement of the Case.

the Second Circuit's holding "credits the Petitioners' with the clairvoyance to know in 1999 that Gregg Wasser would make crude efforts at extortion some four years later in 2003." *Id.* at 14. The Law Professors contend that Petitioners' suit was timely-filed because it was filed two months after a "concrete threat of condemnation." These contentions are without any factual or legal support.

The district court dismissed all of Petitioners' claims as time-barred and as having been waived (Pet. App. at 9-10, 12-13), and the Second Circuit affirmed the judgment of dismissal. Petitioners did not include in their Questions Presented any question relating to these grounds for dismissal (*Id.* at 1) and have not made any argument that the dismissal of their case on these grounds was erroneous, much less that such dismissal presents issues worthy of review by this Court. In reviewing the Second Circuit's decision, it is clear that the Second Circuit dismissed the entire lawsuit. *See Didden v. Village of Port Chester*, 173 Fed.Appx. 931, 932-33 (2d Cir. 2006). Even if Amici, or Petitioners themselves, believe that the dismissal was improper, they have not asked this Court to review the correctness of the dismissal. Since this Court will not consider any questions not set out in the petition (Sup. Ct. R. 14), this action will stand dismissed, no matter the resolution of the questions that Petitioners do propound. Therefore, "the court cannot look into the cause of action". *Mc'Cluny v. Silliman*, 28 U.S. 270, 278 (1830); *see also* Opposition to Petition, at 11. Again, no case or controversy exists, and thus this Court lacks subject matter jurisdiction to hear Petitioners' claims. *Paschall v. Christie-Stewart, Inc.* 414 U.S. 100, 102 (1973); *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969); *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 569 (1947).

In any event, as the district court correctly found, Petitioners' March 30, 1999 letter to the Village of Port Chester Board of Trustees demonstrated that Petitioners were fully aware that a finding of a public purpose would expose them to the prospect of condemnation. *See Didden v. Village of Port Chester*, 304 F.Supp.2d 548, 558-59, 566 (S.D.N.Y. 2004) ("*Didden I*"). Petitioners did not challenge the July 14, 1999 Determination and Findings; rather, they attempted to persuade the Village to carve out from the project areas those

properties that were inside the area. That Petitioners pursued that approach reflects their knowledge that their properties would be subject to condemnation if the Village did not change the project boundaries and adopt the findings.

To avoid this fact, the Law Professors attempt to separate the public use determination from the filing of a petition in state court, as if they were separate events. This is to no avail, because the public use determination and the filing of a condemnation petition are part of the same condemnation proceeding: "The EDPL sets forth a staged process for addressing the various issues that arise during a condemnation-each stage being the subject of its own section (article) of the EDPL. However . . . the five stages of [the] EDPL constitute a single, unitary proceeding." *Didden I*, 304 F.Supp. at 564 (citing *Broadway 41st Street Realty Corp. v. New York State Urban Dev. Corp.*, 733 F.Supp. 735, 743 (S.D.N.Y. 1990)).[3] Thus, contrary to what the Law Professors suggest, the condemnation proceeding began in 1999, not 2003, and Petitioners knew at that time that their properties could be subject to condemnation. *See Didden I*, 304 F.Supp. at 566 ("In their March 1999 Letter, Plaintiffs evidenced full awareness of what was going on in terms of the Redevelopment Project and the LADA. They even acknowledged that their properties were subject to condemnation."); *Didden v. Village of Port Chester*, 322 F. Supp.2d 385, 389 (S.D.N.Y. 2004) ("*Didden II*").

3. The Article 2 stage conclusively determines the need and location of a public project. *See* EDPL Art. 2. This stage includes two sub-stages. First, Article 2 requires the condemnor to conduct the public hearing upon public notice. EDPL §§ 202-203. Following the public hearing, the condemnor adopts a determination and findings which are published. EDPL § 204. Second, aggrieved persons may then seek judicial review in the Appellate Division by filing a petition within thirty (30) days after the completion and publication of the determination and finding. EDPL § 207. The Article 3 stage involves the making of compensation offers for property that has been forced to be subject to condemnation for a public purpose. *See* EDPL Art. 3. The Article 4 stage involves the condemnor's commencement of proceedings to acquire the necessary property and effects a taking of the property under Article 4. *See* EDPL Art. 4. The Article 5 stage concerns the issue of just compensation which includes the filing of claims by condemnees for damages, the filing of appraisals and proffering of expert testimony by the parties, and a decision by the court fixing monetary relief based upon the evidence heard. *See* EDPL Art. 5.

B. Petitioners Did Not Assert A Ripeness Claim

The Law Professors' suggest that Petitioners' right to challenge the public use determination did not ripen until the filing of a petition in state court. Relying upon *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 454 (7th Cir. 2002) and *Palazzolo v. R.I.*, 533 U.S. 606, 618 (2001) both inverse condemnation cases (and more specifically, regulatory takings cases), the Law Professors state that "if the Petitioners had tried to file a suit to block the Village's actions before November 2003, it might have been dismissed for lack of ripeness." Brief of Amicus Curiae Law Professors, at 16. The Court should not address this argument because it was not raised by the Petitioners in their Petition or below. *See Franchise Tax Bd. Of Cal. V. Hyatt*, 538 U.S. 488, 497 (2003) (declining amicus curiae's invitation to reexamine a prior ruling of the Court when the petitioner did not address that issue in the petition); *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 60 n. 2 (1981) (noting that this Court does not decide issues raised by amicus curiae that were not decided by the Court of Appeals or argued by the interested party).

Moreover, in raising their theory, the Law Professors conflate the law concerning direct condemnations with inverse condemnations. "[D]irect condemnation, by invocation of the State's power of eminent domain, presents different considerations from cases alleging a taking based on a burdensome regulation." *Palazzolo*, 533 U.S. at 628; *see U.S. v. Clarke*, 445 U.S. 253, 257 (1980) (discussing the "important practical differences" between direct and inverse condemnation proceedings); *U.S. v. Dow*, 357 U.S. 17, 20 (1958) (same). One such consideration is the issue of public use, which is a practical consideration. *See, e.g., Berman v. Parker*, 348 U.S. 26, 34-36 (1954); *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 2663 (2005). Conversely, the issue of public use is not relevant to a regulatory takings case. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (After this Court's decision in *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922), "neither a physical appropriation nor a public use has ever been a necessary component of a 'regulatory taking.'"). Put simply, the application of regulatory

takings precedents (including decisions analyzing ripeness of claims) to direct condemnation cases has no basis in law and should not be countenanced by the Court. *See Tahoe-Sierra Preserv. Council*, 535 U.S. at 323 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.") (internal footnote omitted).[4]

II. Amici's "Pretectual Takings" Argument Was Not Pled By Petitioners And Should Not Be Heard By This Court.

Despite the Village's findings of a public use to eliminate urban blight, which is amply supported by the record and never disputed by Petitioners, the Law Professors claim that the finding was a "pretext" for condemning Petitioners' properties. *See* Brief of Amicus Curiae Law Professors, at 5. While the Law Professors seek to have this Court consider their "pretextual takings" claim, Petitioners did not raise a "pretextual takings" claim in their Amended Complaint. *See* Am. Comp., at 20-25. Consequently, the Court should not address this argument. *See Palazzolo*, 533 U.S. at 631-32; *Glover v. U.S.*, 531 U.S. 198, 204 (2001); *cf. United Parcel Serv., Inc, supra*, 451 U.S. at 60 n. 2.

Petitioners did not raise this theory because Petitioners, who were fully familiar with events in Port Chester, knew the facts would not support it. As reflected in *Didden I*, the July 1999 Determination and Findings formed the predicate for the acquisition of thirty-eight separate properties. *See Didden I*, 304 F.Supp.2d at 552. To suggest that the Determination was a "pretext" for the taking of some of Petitioners' properties would necessarily require that Petitioners assert that the taking of the other thirty-seven properties was part of the same

4. The differences between physical appropriations and regulatory takings do not end there. In either a direct condemnation or physical takings case, the fact and extent of the appropriation is known. *Palazzolo*, 533 U.S. at 628. In a regulatory takings case, however, the fact and extent of the taking are not known until a court knows "the extent of permitted development" on the land in question. *Id.* (citing *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986)).

"pretext". It would be absurd to contend that the findings were simply a "pretext" to get at one particular set of landowners, while not pretextual as to the other thirty-seven landowners. Moreover, the Law Professors ignore the fact that Petitioners conceded before the district court that they had no problem with the project *per se* or with the July 14, 1999 finding of public use. *Didden I*, 304 F.Supp. at 566-67. Indeed, Petitioners did not argue that the taking of property to effectuate the Project served no valid public purpose, only the taking of *their* properties served no valid public purpose. *Id.* at 559, 566-67. The Law Professors further ignore the fact that Petitioners had not suggested "that the proceeding was commenced in bad faith at that time . . . nor does the record support such a finding." *Id.* at 568.

The Law Professors' bald assertion that the taking was "pretextual" is unsupported by the record. The Redevelopment Project serves a clear public purpose – the redevelopment of the blighted downtown area of Port Chester. *See Didden I*, 304 F.Supp.2d at 559-60; *accord Brody v. Village of Port* Chester, 261 F.3d 288, 290-91 (2d Cir. 2001). Petitioners have never argued that Port Chester was not blighted. Moreover, the Petitioners acknowledged, in their March 1999 letter, that their CVS proposal did not fully satisfy the Village Board of Trustees. *Didden I*, 304 F.Supp.2d at 554, 560 n. 3. G&S's proposal included lot 11, a vacant lot adjoining Petitioners' property that otherwise would have been impossible to develop under Petitioners' plan. As the district court correctly found, Petitioners' plan would not have effectuated the Village's redevelopment plans because that lot would have remained undeveloped and isolated from any future development possibility. *Id.* at 555. Petitioners and Amici have failed to adduce any evidence that the taking of Petitioners' properties was not rationally related to the purpose of removing blighted, urban areas.

The Law Professors' reliance upon *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001); *Aaron v. Target Corp.*, 269 F.Supp.2d 1162 (E.D. Mo. 2003), *rev.'d*, 357 F.3d 768 (8th Cir. 2004), and *Cottonwood Christian Ctr. v.*

Cypress Redev. Agency, 218 F.Supp.2d 1203 (C.D. Cal. 2002), as support for their "pretextual taking" argument, is misplaced as each case is readily distinguishable. In *Armendariz*, 75 F.3d at 1313, the City of San Bernardino conducted a series of housing code enforcement sweeps against the plaintiffs' properties which failed to not ˙y them in advance that the sweeps would take place, failed to inform them at the time of the closures why their building were being closed down, and did not identify the specific code violations until well after the sweeps had been completed and the buildings closed. In *99 Cents Only Stores*, 237 F.Supp.2d at 1129-30, the City of Lancaster admitted that (1) the *only* reason it sought to condemn the subject property was to satisfy the expansion demands of Costco and (2) it was willing to go to any lengths, even so far as condemning commercially viable, non-blighted real property, simply to keep Costco within the City's boundaries. *Aaron* involved a situation where the private entity (Target) surreptitiously manipulated a locality's eminent domain procedure from its inception solely to take ownership in the building it was leasing for the purpose of building a new Target store on the site. 269 F.Supp.2d at 1165. In addition, Target authored a blight study, or at least the critical part of it finding that the properties were blighted or unsanitary, and "beefed up" the study with the assistance of the City. In *Cottonwood Christian Ctr.*, 218 F.Supp.2d at 1228-29, the court held that sufficient circumstantial evidence of a discriminatory intent existed behind City of Cypress' denial of a conditional use permit and subsequent condemnation of the plaintiff church's property. The court also held that the stated purposes for the City's refusal to grant a conditional use permit and condemnation of the church's property – blight and generating revenue – was not "sufficiently compelling to justify burdening Cottonwood's religious exercise." *Id.* at 1228. Conversely, in the present case Petitioners did not object to the public use determination and failed to adduce any evidence that the taking of their properties "was not rationally related to the purpose of the overall Redevelopment Project." *Didden I*, 304 F.Supp.2d at 559-60.

The Law Professors warn that if the Second Circuit's decision is not overruled, "private developers will be handed a blueprint on how to take private property for their own benefit, irrespective of any public interest." Brief of Amicus Curiae Law Professors, at 12. There is no merit to this argument because the Second Circuit's decision was unpublished, and thus cannot be cited in unrelated cases before the Second Circuit or any other court. (Second Circuit Local Rule 0.23).

Even assuming the Law Professors are correct, they still fail to provide a basis for the Court to accept the Petition. Indeed, "the importance of an issue should not distort the principles that control the exercise of [the Court's] jurisdiction. To the contrary, 'by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicatory process.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (quoting *Adams v. Robertson*, 520 U.S. 83, 92, n. 6 (1997) (per curiam).

III. Property Rights Are Held Subject To The Sovereign's Eminent Domain Power.

PLF maintains that Petitioners "were ordered, as a condition of maintaining their property rights, to give up $800,000." Brief of Amicus Curiae PLF, at 7. PLF's argument lacks merit.

First, as detailed in Respondents' Opposition to Petition, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), do not present any compelling reason for granting the writ. *See* Opposition to Petition, at 24-26. Second, although it is unclear to what "property rights" PLF refers, PLF's brief implies that Petitioners have a right to possess some of their properties free from the exercise of condemnation, despite the prior, unchallenged finding of a public purpose for the use of eminent domain with respect to some of their properties. Since the Village in July 1999 adopted the Determination and Findings, and Petitioners did not avail themselves of the procedures offered by New York law to challenge the Determination and Findings, Petitioners' properties were subject to the invocation of eminent domain to fulfill the established

public purpose. "There is no absolute constitutional right not to have one's property condemned." *Langley Land Co. v. Monroe County*, 738 F.Supp. 1580, 1583 (M.D. Ga. 1990). In addition, it is well-established that all private property rights are held subject to the sovereign's exercise of the eminent domain power. *See Adirondack Ry. Co. v. New York*, 176 U.S. 335, 346 (1900); *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 481 (1924); *U.S. v. Carmack*, 329 U.S. 230, 236-37 (1946). The eminent domain power is limited by the requirement that the taking is for a public use and that the condemnee is paid just compensation. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003); *U.S. v. Jones*, 109 U.S. 513, 519 (1883); *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

In the present case, Petitioners did not timely object to the public use determination and conceded that their properties were appropriately placed in the condemnation zone. *Didden II*, 322 F.Supp.2d at 389. Consequently, Petitioners "have no additional substantive rights other than to receive just compensation from Port Chester pursuant to Articles 3, 4, and 5 of the EDPL." *Id.*; *see U.S. v. Agee*, 322 F.2d 139, 143 (6th Cir. 1963) ("Where the taking is for a public purpose, the rights of the property owner are satisfied when he receives that just compensation which the Fifth Amendment requires as the price of the taking."); *cf. U.S. v. 3,065.94 Acres of Land*, 187 F.Supp. 728, 729 (S.D. Cal. 1960) ("There are only three issues raised by the filing of a complaint in condemnation, viz.: (1) the right to take, i.e., 'public use;' (2) 'just compensation;' and (3) to whom the just compensation should be paid.").

Further, there is no basis for PLF's argument that Petitioners' were "ordered" to do anything. The making of a settlement offer by a developer, which Petitioners were free to reject, cannot be twisted in to a municipal edict with which Petitioners were required to comply. Petitioners declined the offer and did not relinquish any "rights".

CONCLUSION

Amici Curiae have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

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No. 06-652

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In The
Supreme Court of the United States

BART DIDDEN, DOMENICK BOLOGNA,
CABERNET 119 REALTY CORP., OPUS 113 CORP.,
PAUILLAC 115 REALTY CORP.,
AND 117 NORTH MAIN STREET CORP.,

Petitioners,

v.

THE VILLAGE OF PORT CHESTER, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

~~MOTION OF PETITIONERS FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND~~ SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Petitioners hereby move this Court for leave to file the following Supplemental Brief in response to Respondents' Supplemental Brief.

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SUPPLEMENTAL BRIEF

Petitioners submit this brief in response to Respondents' improperly-filed "Supplemental Brief." The "Supplemental Brief" submitted by Appellees does not meet the limited permissible circumstances for filing such briefs. *See* S. Ct. R. 15(8). It is simply a rehashing of Respondents' arguments styled as a response to the briefs filed by *amici*. No doubt every Respondent would like an opportunity to respond to *amici* in support of a Petition for *Certiorari*. Had the U.S. Supreme Court wished to allow such briefing, it would have provided for it in its rules.

The impropriety of the brief is compounded by the fact that Respondents continue to ask this Court to resolve disputed factual allegations in an apparent attempt to make this very simple case seem complicated. This case was dismissed on a Rule 12(b)(6) motion. As such, it does not have a "record" (Supp. Br. 7), nor is the question before this Court one of whether "the facts would [] support" a pretextual takings claim. (Supp. Br. 6.) Petitioners alleged that their property was condemned solely because they refused to pay a private party $800,000 or give that private party a 50% interest in their business. The Second Circuit found that this allegation did not state a claim under the Fifth and Fourteenth Amendments to the Constitution. That is the only question before this Court, and Respondents' attempt to fog the issue through filing an inappropriate and scattershot "Supplemental Brief" should not obscure this case's obvious simplicity.

Petitioners regret having to burden this Court with further briefing and thank the Court for considering this response.

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No. 06-652

IN THE

Supreme Court of the United States

BART DIDDEN, *et al.*,

Petitioners,

v.

VILLAGE OF PORT CHESTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. May this Court properly consider the merits of Petitioners' theoretical constitutional claims which have been dismissed as barred by the statute of limitations?

II. Have Petitioners shown compelling reasons to grant the Petition where the Second Circuit decided this case based on the statute of limitations and its determination is set forth in an unpublished summary order which may not be cited as precedent?

III. May this Court properly consider a "governmental exaction" theory which was not pled in the Amended Complaint?

IV. Where a municipality and its designated developer entered into a contract which obligated the developer to redevelop a blighted area and obligated the municipality to pursue condemnation of privately-owned property within the blighted area upon request from the developer, have Petitioners shown that there is a compelling reason to review the determinations of the courts below that a settlement offer made by the developer to the owners of private property in an effort to avoid litigation did not give rise to any constitutional violation?

RULE 29.6 DISCLOSURE STATEMENT

G&S Port Chester, LLC, the only Respondent in corporate form, is a non-governmental limited liability company. It does not have a corporate parent and no publicly held company has any ownership interest in it.

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JURISDICTION

Respondents assert that this Court lacks jurisdiction over the Petition because Petitioners' constitutional arguments do not present a "case or controversy" given that this action was dismissed upon the independent grounds of statute of limitations and waiver, which Petitioners do not contest in this Court.

INTRODUCTION

The Petitioners in this case have presented no "compelling reasons" for this Court to grant their Petition for Writ of Certiorari ("Petition"). Sup. Ct. R. 10. Petitioners have failed to challenge in their Petition the District Court's finding, which was affirmed by the Second Circuit, that the running of the applicable statute of limitations barred Petitioners' claims. The District Court also found that Petitioners had waived their right to challenge the public purpose of the redevelopment project, a finding not disturbed by the Second Circuit. Petitioners have not included in their Questions Presented any question relating to these grounds for dismissal (Pet. at 1) and have not made any argument that the dismissal of their case on these grounds was erroneous, much less that such dismissal presents issues worthy of review by this Court.

Petitioners' attempts to obtain review by casting the Second Circuit's interpretation of *Kelo v. City of New London*, 545 U.S. 469 (2005) to mean that any use of eminent domain within a blighted, urban renewal district is constitutional, as a matter of law, is misplaced. The Second Circuit mentioned *Kelo* only after finding that the District Court properly dismissed Petitioners' claim because the statute of limitations had run. It commented that, even if not time barred, the challenge by these Petitioners to this project was without merit. It did not rule that all challenges to all projects would be barred. In any event, the Second Circuit entered a summary order which may not be cited in any other cases, so the Second Circuit's comment has no application beyond this case.

Petitioners' exaction claims also are unavailing. Petitioners failed to properly plead these claims in their Amended Complaint. Moreover, Petitioners' theory that Respondents' conduct is actionable under *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1974) does not present any compelling reason for granting the writ. As the District Court properly recognized, Petitioners did not have any conditions placed upon the use of their property while they were in ownership. Petitioners' sole claim is that the Village of Port Chester (the "Village") refused to process their application to re-zone their property so as to remove it from the project area. However, since there was a valid, unchallenged public purpose finding, Petitioners had no substantive right to demand that their property be excluded from redevelopment and the refusal to grant their request is not an exaction. To the contrary, the Village sought to have the entire project area redeveloped (including some of Petitioners' properties) and had imposed contractual obligations upon the developer to redevelop the entire area, with financial penalties if it breached. Petitioners formulated a plan to redevelop their properties only after the redevelopment project was well underway. For the Village to agree to Petitioners' belated plan meant the redevelopment would be less extensive than it preferred and create an isolated building lot. In addition, the developer would confront potential liability to the Village for not completing the development. Thus, it would hardly be an 'exaction" to request compensation for these losses.

STATEMENT OF THE CASE

This case involves an effort by Petitioners, who were landowners in a blighted urban renewal district, to belatedly cash in on the hard work and millions of dollars of investment put at risk by a municipality's designated developer to redevelop the long-neglected community in accordance with an integrated plan adopted by the municipality. Petitioners conceded below that they have no issue with the redevelopment project or even with the municipality's public purpose finding authorizing the use of eminent domain. (Pet. App. 52-53). Petitioners could not interest anyone in their properties until several years after the project was underway. At that point, the municipality asked the developer to meet with Petitioners to try to avoid a contested condemnation proceeding. The developer made a good faith proposal, which Petitioners rejected and have since tried to turn into a federal case. The Courts below properly dismissed the action; the Second Circuit's determination was rendered in a summary order which may not be cited in unrelated cases and lacks precedential value.[1]

Starting in November, 1977, the Village adopted a series of urban renewal plans designed to clear and reconstruct blighted, substandard and unsanitary areas of the Village. (Am. Compl., Ex. 1 at 1).[2] Despite repeated efforts and changes

1. While undoubtedly unintentional, the version of the Second Circuit's summary order set forth in the Appendix to the Petition does not contain the prohibition against citation contained in the official version of the summary order.

2. Contrary to Petitioners' assertion (Pet. at 1 n.1), the Courts below did not simply look to the bare allegations of the Amended Complaint. On a Rule 12(b)(6) motion, the Courts below may, and did, consider the written instruments attached to it as exhibits, the materials incorporated in it by reference, documents which, though not incorporated by reference, are "integral" to it, and public documents which may be the subject of judicial notice. *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991); 2 Moore's Federal Practice (3d Ed.) ¶12.34[2]).

over a nearly 20 year period, these efforts did not succeed. (*Id.*; Am. Compl., Ex. 3 at Ex. A). Nevertheless, Petitioners have never disputed that the areas in question were blighted.

In April, 1998, the Village, after soliciting proposals from prospective developers, selected a proposal from G&S Port Chester, LLC ("G&S") for the redevelopment of the Marina Redevelopment Project Urban Renewal District (the "MUR District") (Am. Compl., Ex. 1 at 2). The project provided for the redevelopment of 27 acres of the Village, the development of 500,000 square feet of modern retail establishments, and the construction of millions of dollars worth of public infrastructure, including: a waterfront park and new sea wall; new water, sanitary and storm sewers, new traffic controls, new street curbs and lights; and the removal of old overhead utility lines. (Pet. App. at 18, 20).

In 1999, the Village conducted a process of public hearings and meetings leading to the adoption, on July 14, 1999, of a Land Acquisition and Disposition Agreement ("LADA") with G&S. (*Id.* at 1-3; Am. Compl., Ex. 3). The LADA, a complicated instrument running 60 single-spaced pages, provided that the Village would sell the land within the MUR District to G&S and that G&S would construct the project on the land, including required public improvements, in accordance with the project plans approved by the Village. (Am. Compl., Ex. 1). The LADA required G&S to implement and construct the project diligently. It imposed liability upon G&S for failure to meet its obligations and required G&S to post substantial security (*Id.* at 41-45, 51-107). In turn, the Village was subject to liability if it breached its contractual obligations. (*Id.* at 53-54).

Since the Village did not then own all of the property in the MUR District, the LADA required that the Village would, upon notice from G&S, proceed diligently to acquire by eminent domain title to privately owned parcels within that area.

(*Id.* at 12-13). G&S was ultimately responsible for the costs of acquisition. (*Id* at 13). In addition, G&S was given the right to proceed on its own (*i.e.*, through negotiation) to acquire title to the privately-owned parcels. (*Id.* at 66).

At the same time that the Village adopted the LADA, it also adopted its Determination and Findings pursuant to Article 2 of the New York Eminent Domain Procedure Law ("EDPL"), concluding that acquisition of private property in the MUR District would be for a public purpose, specifically in order to provide for "the clearance and reconstruction of certain blighted, substandard and unsanitary areas of the Village". (Am. Compl., Ex. 3 at Ex. A).

Petitioners are the owners of certain properties in the Village, located both inside and outside the MUR District. (Am. Compl. ¶36). In 1996, before G&S entered the Port Chester scene, Petitioners attempted to interest CVS, a national pharmacy chain, in constructing a store on their property but were told that CVS had no interest in Port Chester. (Pet. App. at 24-26).

G&S and Petitioners had a long course of dealing and had met repeatedly over the years in an effort to find common ground. (Pet. App. 28). Anticipating that the project would increase development interest in the Village, and possibly trigger interest from CVS, Petitioners Didden and Bologna, in March, 1999, before the adoption of the LADA and the EDPL Determination and Findings, complained to the Village that they would be put at a "unique disadvantage" by the use of condemnation for the G&S project and urged the Village to carve their properties entirely out of the District. (Pet. App. at 24-27).

Petitioners were notified in writing of the public hearing on the proposed LADA and the EDPL Determination and Findings (Pet. App. at 19). However, they did not commence

judicial proceedings to challenge the adoption of the LADA or the July, 1999 Determination and Findings (*Id.*), though state law permitted such challenges.

Because of the project's size and complexity, it proceeded in stages. While the first phase was under construction, the second phase was significantly delayed by a federal injunction lifted on August 8, 2001, (*Id.* at 21), and thereafter by state court stays of the eviction of certain tenants. (*Id.* at 21-22). Despite these difficulties, the development proceeded.

In 2002, G&S announced its intention to locate Walgreens, a national drug store chain, in the "Retail E" section of the project, an area that includes properties owned by Petitioners. (*Id.* at 22). G&S had turned to Walgreens after it could not make a deal with CVS. (*Id.*). In response, CVS turned to Petitioners. (*Id.* at 23). Petitioners entered into a lease with CVS, despite knowing that, under the LADA, G&S might request that the Village pursue condemnation of the portion of their property that was located within the District boundaries. (*Id.*). According to Petitioners, the Village Board reacted positively to the CVS Project and told them to pursue an application to the Village Planning Commission. (Am. Compl. ¶41). However, the Village Attorney told Petitioners that they would need to come to an understanding with G&S in order to be able to proceed with the CVS Project. (*Id.* ¶42). Any such statement would have been entirely consistent with the LADA, which obligated G&S to develop the project, including Walgreens, and required G&S to obtain title from the Village to the privately-owned land, including the property owned by the individual Petitioners within the MUR District.

In November, 2003, at the urging of the Village, representatives of G&S and Petitioners met to discuss a resolution of their differences. Petitioners allege that G&S demanded $800,000 or a partnership interest in Petitioners' CVS

Project or else G&S would proceed with its project, including the condemnation of Petitioners' properties within the MUR District. Petitioners refused the demand (Am. Compl. ¶¶48-49).[3]

Since the November 5, 2003 meeting did not lead to a resolution, a state condemnation proceeding was brought by the Village against Petitioners' properties within the MUR District. (Am. Compl. Ex. 3). Petitioners then initiated this action and unsuccessfully sought to have the District Court enjoin the condemnation proceeding. (Pet. App. 16-59); *Didden v. Village of Port Chester*, 304 F. Supp. 2d 548 (S.D.N.Y. 2004) ("*Didden I*"). The District Court invited Respondents to move to dismiss and, following the submission of written motion papers, the District Court granted the motion and dismissed the Amended Complaint. (Pet. App. at 5-15; *Didden v. Village of Port Chester*, 322 F.Supp.2d 385 (S.D.N.Y. 2004) ("*Didden II*"), *aff'd*, 173 Fed. Appx. 931, 2006 WL 898093 (2d Cir. 2006). In granting dismissal, the District Court relied upon its earlier decision in *Didden I*, as supplemented by the reasons set forth in its *Didden II* decision. (Pet-App. at 7). Petitioners appealed to the Second Circuit which affirmed, by summary order, issued April 5, 2006. (Pet. App. at 1-4).

The District Court held that the action was barred by the statute of limitations. It reasoned that the three year statute of limitations began to run when Petitioners knew or had reason to know of the injury that was the basis of the action. (Pet. App. at 10). The District Court reasoned that the statute began to run on July 14, 1999, when the Village adopted the LADA and the EDPL Determination and Findings, and, therefore, the action

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3. G&S contends that it had valued the CVS deal at $2 million and proposed $800,000 as a figure at which either G&S or Petitioners could buy-out the other in order to avoid litigation. (Pet. App. at 29). If Petitioners had accepted the $800,000 buy-out, Petitioners would also have been paid the fair market value of their property. (*Id*).

was not timely. (*Id*). The District Court rejected Petitioners' argument that they did not suffer any injury until November 5, 2003, when G&S made its settlement demand, reasoning that, as shown by Petitioners' own March 30, 1999 letter to the Village, Petitioners were fully aware that the adoption of the LADA and EDPL Determination and Findings would expose their property to condemnation. (*Id.*). On appeal, the Second Circuit agreed with the District Court, holding that Petitioners had reason to know of their injury as of July 14, 1999, and, likewise, rejected the claim that Petitioners' injury did not accrue until November, 2003. (Pet. App. at 3).

The District Court also concluded that Petitioners had waived their right to challenge the public purpose of the redevelopment project. It concluded that, because Petitioners were fully aware of the consequences of condemnation findings, had notice of the public hearings that preceded the Determination and Findings, and failed to bring a judicial challenge within the time allowed by New York law, it was too late for Petitioners to challenge the Determination and Findings. (Pet. App. at 12-13). The Second Circuit did not discuss this conclusion in its summary order.

While the District Court's dismissal on statute of limitations and waiver grounds by itself disposed of the case, the District Court commented that Petitioners' allegation that G&S had made an "extortionate" demand added nothing of legal significance to their claims. The District Court noted that, as Petitioners themselves acknowledged, G&S had the legal right under the LADA to notify the Village to seek condemnation and, even if G&S asked for money in exchange for giving up its legal rights, that would not give rise to any claim by Petitioners. (*Id.* at 14). The Second Circuit agreed, stating that voluntary attempts to resolve Petitioners' demands were not unconstitutional exaction in the form of extortion. (*Id.* at 4).

The District Court also considered Petitioners' "new" argument that there had been an unconstitutional exaction, concluding that there had been no exaction. No restrictions had been put on Petitioners' property during their ownership. Petitioners had proceeded to seek approvals for their CVS Project knowing that some of their property was subject to condemnation. "Since [Petitioners] concede that the July 1999 findings are unchallenged and their property was appropriately placed in the condemnation zone, the constitutional public purpose requirement has been met". (*Id.* at 12). Petitioners had no other substantive rights other than to receive just compensation. (*Id.*). The Second Circuit agreed.

The Second Circuit heard oral argument on March 24, 2005. Thereafter, this Court, on June 23, 2005, handed down *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005). The next day, counsel for Respondents wrote to the Second Circuit alerting it to the *Kelo* decision and offering to brief its import on this litigation. However, the Second Circuit did not invite such submissions and decided this case on April 5, 2006, without them.

The Second Circuit, in its summary order, observed that, even if Petitioners' claims were not time-barred, *Kelo* compelled rejection of Petitioners' claim that the Takings Clause prevents the State from condemning their property for a private use within a blighted, urban renewal district. (Pet. App. at 3-4). This observation was directly responsive to the opening statement in Petitioners' Summary of Argument in their main brief to the Second Circuit: "The District Court did not rule upon the merits of Plaintiff's [sic] claim that condemnation of the Subject Properties was undertaken solely for a private purpose in violation of the Public Use Clause of the Fifth Amendment." (Pet. Br. at 13).

REASONS FOR DENYING THE PETITION

I. Because This Action Was Dismissed As Time-Barred And As Waived, And Petitioners Have Not Sought Review Of Those Grounds For Dismissal, This Court Should Not Consider Petitioners' Constitutional Arguments

The District Court dismissed all of Petitioners' claims as time-barred and as having been waived (Pet. App. at 9-10, 12-13). The Second Circuit agreed that Petitioners' action is time-barred (*Id.* at 3) and affirmed the judgment of dismissal. In seeking review in this Court, Petitioners have not included in their Questions Presented any question relating to these grounds for dismissal (*Id.* at 1) and have not made any argument that the dismissal of their case on these grounds was erroneous, much less that such dismissal presents issues worthy of review by this Court. Since this Court will not consider any questions not set out in the petition (Sup. Ct. R. 14), this action will stand dismissed, no matter the resolution of the questions that Petitioners do propound[4]. It is both ancient and elementary that

4. While the Court may consider questions that are "fairly included" within the questions presented (S.Ct. R. 10[a]), questions such as whether the statute of limitations has run, or whether Petitioners have waived their rights, are "analytically and factually" distinct from whether *Kelo* forecloses all claims of private purpose takings and what constitutional limits, if any, are imposed on demands for cash for refraining from the use of eminent domain. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U. S. Phillips Corp.*, 510 U.S. 27, 32 (1993); *Yee v. Escondido*, 503 U.S. 519, 537 (1992) (the question whether an ordinance effected a physical taking did not include the related question of whether it effected a regulatory taking); *Am. Nat. Bank and Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606, 608 (1985) (question of whether a complaint adequately alleged conduct of racketeering enterprise was held not to be "fairly included" in a question of whether the statute requires that the plaintiff suffer damages through defendant's conduct of the enterprise).

where a case is dismissed as time-barred, "the court cannot look into the cause of action". *Mc'Cluny v. Silliman*, 28 U.S. 270, 278 (1830). Because this action has not been timely brought, and Petitioners can no longer contend that it was, the Court may not examine the merits of Petitioners' underlying claims.

This Court reviews judgments, not statements in opinions, an admonition that is applied with special force where the statements raise constitutional questions as it is the Court's practice to avoid the unnecessary decision of such issues. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 734 (1978). Even if the Court of Appeals makes an incorrect statement in its opinion, this Court does not examine the grounds upon which the Court of Appeals made a correct decision. *Alpha S.S. Corp. v. Cain*, 281 U.S. 642, 643 (1930).

To satisfy the case or controversy requirement of Article III of the United States Constitution, the plaintiff must suffer an actual injury that can be redressed by a favorable judicial decision. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). This requirement persists throughout all stages of review. *Honig v. Doe*, 484 U.S. 305, 317-18 (1988). Because the exercise of judicial power under Article III depends upon the existence of a case or controversy, the federal courts lack the power to render advisory opinions. *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993). A case must involve a present, live controversy if the Court is to avoid rendering an advisory opinion on abstract propositions. *Hall v. Beals*, 396 U.S. 45, 48 (1969). The federal courts should not decide a case on its merits if such a decision could no longer provide meaningful relief to the parties. *Christian Coal. of Ala. v. Cole*, 355 F.3d 1288, 1291 (11th Cir. 2004).

No matter what the outcome of the constitutional questions posed by Petitioners, their action has been dismissed as untimely. A favorable decision on the merits of their issues will not change

that result and any opinion on the constitutional issues would be advisory. This case is similar to *Paschall v. Christie-Stewart, Inc.* 414 U.S. 100, 102 (1973), where the holders of mineral rights disputed the validity of tax sale deeds to the mineral rights, claiming that they had not been given constitutionally adequate notice of the tax sales. This Court directed the state court to determine whether the petitioners' claims were barred by the statute of limitations because, if so, any decision by this Court on the constitutional questions would be advisory and beyond its jurisdiction. *Id.* at 101-102. Even the dissent recognized that if a constitutional adjudication is not the only basis upon which a judgment rests, a review of the constitutional adjudication by this Court would be advisory since the judgment would rest, in any event, upon independent grounds. *Id.* at 104 (Douglas, J., dissenting).

Stated somewhat differently, a case is moot where the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969); *De La Teja v. U.S.*, 321 F.3d 1357, 1362 (11th Cir. 2003). To have such an interest, there must be an injury that is susceptible to some judicial remedy. *R.C. Bigelow v. Unilever N.V.*, 867 F.2d 102 (2d Cir.), *cert denied*, 493 U.S. 815 (1989). Here, a favorable determination to Petitioners on their questions presented would provide them no remedy as the judgment of dismissal would remain standing on independent grounds. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001) ("Because we conclude that the statute of limitations had run as a matter of law prior to 1989, we need not reach the remaining issues raised by the Andrews regarding the sufficiency of the evidence. Moreover, given that we conclude that their RICO claims were untimely, Pincay and McCarron's cross-appeal raising the issue of election of damages is moot"); *cf. Bogle-Assegai v. Conn.*, __ F.3d __, 2006 WL 3436583 at *12 (2d Cir. 2006) ("Bogle-Assegai's arguments going to the merits of her claims of discriminatory

and disparate treatment are moot in light of the dismissals on the grounds of improper service, sovereign immunity, and untimeliness"); *Comm'r of Pa. Dept. of Pub. Welfare v. Markiewicz*, 930 F.2d 262, 266-67 (3d Cir. 1991) (finding that district court erred in addressing *res judicata* and personal jurisdiction where those issues were not essential to the court's conclusion that it lacked subject matter jurisdiction).

Treating Petitioners' constitutional claims as moot in light of the statute of limitations and waiver dismissal is consistent with this Court's long-standing policy of avoiding constitutional questions where the record presents some other ground upon which the case may be disposed of. *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 569 (1947); *accord, City of Mequite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-295 (1982). Constitutional questions should be reached only if, after decision of non-constitutional questions, resolving the constitutional questions remains necessary. *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 209-10 (1960). The Court should not pass on constitutional questions unless such adjudication is unavoidable. *Jean v. Nelson, supra; Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944). Here, Petitioners' constitutional claims should not be reached because their action stands dismissed on statute of limitations and waiver grounds– independent grounds for dismissal which Petitioners do not question in this Court.

Also relevant here is the well settled practice of this Court not to review a question of federal law decided by a state court where the state court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997). Here, the decision of the Court of Appeals to affirm the judgment dismissing Petitioners' action rests on a ground (statute of limitations) that is independent of the constitutional questions and more than adequate to support the judgment.

II. The Second Circuit's Summary Order Does Not Create Any "Constitutional Immunity", Does Not Have Any Precedential Value, And Does Not Give Cause To Re-Examine *Kelo v. City Of New London*

Petitioners contend that the Second Circuit interpreted *Kelo v. City of New London*, *supra*, to mean that any use of eminent domain within a blighted, urban renewal district is constitutional, as a matter of law. (Pet. at 8). This is not so. The Second Circuit stated only that, even if Petitioners' claims were not time-barred, "to the extent that *they* assert that the Takings Clause prevents the State from condemning *their* property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, . . . [*Kelo*] obligates us to conclude that *they* have articulated no basis upon which relief can be granted." (Pet. App. at 3-4) (emphasis added). As is evident, the Second Circuit did not hold that all Takings Clause challenges are precluded; it merely held that *Petitioners* had failed to set forth a viable challenge under the facts presented.[5]

That the Second Circuit limited its holding to this particular case is apparent from its use of a summary order. Under the rules of that Court, summary orders are used where the decision is unanimous and the panel believes that no jurisprudential purpose would be served by a written opinion. While the court may append a brief written statement explaining the basis for its decision in its summary order, these statements do not constitute formal opinions, are unreported, and are not be cited

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5. The Second Circuit's statement was a direct response to Petitioners' complaint in their main brief to that Court that the District Court "did not rule on the merits of Plaintiffs' claim that condemnation was undertaken solely for a private purpose in violation of the Public Use Clause of the Fifth Amendment". (Br. at 13).

in unrelated cases before the Second Circuit or any other court. (Second Circuit Local Rule 0.23).[6]

While Petitioners contend that the issues presented are of "broad impact" and that if the Second Circuit's interpretation stands, it will effectively insulate condemnations in redevelopment areas from judicial review, (Pet. at 10), Petitioners' contentions are without proper basis as the lower courts here decided just this case and the Second Circuit's summary order has no precedential value. It is not even proper to cite it in any unrelated case. *Crocco v. Xerox Corp.*, 137 F.3d 105, 108 n.4 (2d Cir. 1998).

Nor would this case present a proper basis for re-examination of *Kelo*. As the District Court found, in denying Petitioners' request for a preliminary injunction, Petitioners have asserted "that they have no issue with the Redevelopment Project itself or with Port Chester's July 19, 1999 finding of public use". (Pet. App. at 52). The District Court noted that Petitioners had "conceded, as they must, that the implementation of the Redevelopment Project was for a public purpose . . ." (Pet. App. at 53). Petitioners, recognizing that a challenge to the Village's 1999 Determination and Findings was futile, had shifted their focus to the claim that, because the LADA had given G&S the

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6. The Second Circuit is presently contemplating a change to its rules which would permit citation to summary orders issued after January 1, 2007. However, the proposed rule would continue to bar citation of summary orders, such as the one here, rendered before January 1, 2007. The summary order in this case contains a legend, required by the Second Circuit's rules, stating: "THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA."

right to request the Village to pursue condemnation[7], the LADA had given the developer a "club" to use against Petitioners in negotiations. (*Id.*). However, this has nothing to do with the public purpose finding, or with *Kelo*.

The Village's public purpose in authorizing condemnation of the private property within the MUR District was "the clearance and reconstruction of certain blighted, substandard and unsanitary areas of the Village", as well as to improve the public access to the waterfront, protect and encourage water-dependent uses, and remediate environmental problems. (Am. Compl. Ex. 3 at Ex. A).

In *Berman v. Parker*, 348 U.S. 26 (1954), this Court held that the use of eminent domain in connection with the

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7. The Village could have refused to proceed with condemnation; however, doing so could have exposed the Village to a contract damage case brought by G&S. This is not any different from the situation where governmental entity enters into a lease or other financial transaction. The legislative branch could choose not to budget the funds to pay the obligation but, if the funds are not provided, the government may be held liable for damages. *See, e.g., U.S. v. Winstar Corp.*, 518 U.S. 839, 870 (1996) (passage of FIRREA, which raised core capital requirements for thrifts and prohibited treatment of supervisory goodwill as an asset, breached thrifts' contracts with the FHLBB and FSLIC to permit thrifts to treat supervisory goodwill as an asset for regulatory capital purposes); *Centex Corp. v. U.S.*, 395 F.3d 1283, 1311 (Fed. Cir. 1997) (passage of legislation which was designed specifically to allow the government to re-appropriate the profits that plaintiffs expected to obtain from a transaction, abrogated the government's obligations under the contract); *cf. Mobil Oil Exploration & Producing Southeast, Inc. v. U.S.*, 530 U.S. 604, 620-21 (2000) (breach by United States of lease contracts granting oil companies rights to explore and develop oil was substantial, deprived the companies of the benefit of their bargain, and amounted to a repudiation of their contracts); *U.S. v. Spearin*, 248 U.S. 132, 138 (1918) ("When the government annulled the contract without justification, it became liable for damages.").

elimination of blight was a constitutionally valid public purpose, notwithstanding that the petitioner's property was not blighted and notwithstanding that petitioner's property would be put into other private hands. Here, that Port Chester's downtown and waterfront area was blighted is not disputed. The government having legitimately found the area blighted, the manner of the drawing of the boundary line is not justiciable. *Id.* at 35-36.

Kelo did not involve a blight-based condemnation and eight of the Justices expressly reaffirmed the continued viability of *Berman v. Parker*[8], as well as that of *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

The majority opinion of Justice Stevens (reflecting the views of five Justices) reflected the Court's endorsement in *Berman* of "the purpose of transforming a blighted area into 'a well-balanced' community through redevelopment." *Kelo*, 125 S. Ct. at 2665. The majority was also well aware that, in both *Berman* and *Kelo*, the private developers were required by contract to use the property to carry out the redevelopment plan, *id.* at 2666 n.15, as is the case here.

In her *Kelo* dissent, Justice O'Connor, joined by two other Justices, agreed that the holding in *Berman* was "true to the principle underlying the Public Use Clause". *Id.* at 2674. In particular, Justice O'Connor recognized that underlying *Berman* was a legislative finding that eliminating the existing property

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8. While some states have recently, as a matter of policy, reconsidered the traditionally broad definition given public purpose, the use of eminent domain for blight removal has not been seriously questioned. In *County of Wayne v. Hathcock*, 471 Mich. 446, 475-76; 684 N.W.2d 765, 783 (2004) while the Michigan Supreme Court announced that it would no longer treat a generalized economic benefit as being a sufficient basis to transfer condemned property to a private entity, it specifically reaffirmed the selection of land for condemnation on the basis of the need to remedy urban blight.

use was necessary to remedy the harm. "Thus a public purpose was realized when the harmful use was eliminated." *Id.* Because the taking directly achieved a benefit, it did not matter that the property was turned over to a private use. *Id.*

Here, in Port Chester, the public purpose was blight removal; that purpose was achieved by the elimination of the blighted areas, no matter what was done with the property thereafter and even if some property within the district was not itself blighted. Justice O'Connor's dissent in *Kelo* objected to the condemnation there because there was no claim that any of the property to be condemned was itself the source of any social harm. *Id.* at 2675. Her concern is not implicated here because of the undisputed finding that the project's purpose was blight removal.

Of the nine Justices who heard *Kelo*, only Justice Thomas questioned the continued viability of the *Berman* precedent. *Id.* at 2685.

Petitioners, while relying upon Justice Kennedy's *Kelo* concurrence, have nevertheless persisted in "making the incorrect assumption that review under *Berman* and *Midkiff* imposes no meaningful judicial limits on the government's power to condemn any property it likes." *Id.* at 2670 (Kennedy, J., concurring). In seeking review of this case, Petitioners claim that *Kelo* creates an immunity from judicial review for urban renewal plans. That Petitioners could not succeed in their challenge – in large measure due to their own concession that the July, 1999 Determination and Findings were valid – does not mean that other petitioners could not succeed in other cases.

Moreover, Petitioners gloss over the significance of the term "redevelopment plan" when they contend that, under the Second Circuit's view, "there can be no judicial review of takings within the area, for as long as the redevelopment designation lasts".

(Pet. at 13). Much depends upon the purpose of the redevelopment. The plan in question here is an urban renewal, blight-removal plan, not simply a plan for economic betterment. *Kelo* indicates that at least eight Justices continue to agree that blight removal is a constitutionally permitted purpose.

Petitioners also do not define the type of challenges that they would wish to bring with respect to takings within an urban renewal area. Of significance, the thrust of Petitioners' challenge all along has been their desire to have the properties that are included within the project area carved out of the project. But, as the Second Circuit recognized, that issue is not justiciable, at least in the federal courts. (Pet. App. at 4). It has always been without question that the issue of the quantity and location of the property to be condemned is purely political and "not the subject of judicial inquiry". *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 (1923); *see Berman*, 348 U.S. at 35-36 ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."); *Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960, 963-64 (5th Cir. 1994) (necessity and expediency of exercising condemnation power, and the extent of the appropriation, "are political or legislative, and not judicial, questions, the legislative determination of which is conclusive, and not reviewable by the courts). As articulated in *Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612, 618 (S.D.N.Y. 1985), *affirmed*, 771 F.2d 44 (2d Cir.), *cert. denied*, 475 U.S. 1018 (1985),

> [o]nce a legitimate public purpose for the overall project is conceded . . . the court cannot get involved

> in parsing the particular degree of public or private motivation behind the inclusion of a particular site in the Project area, so long as that inclusion could rationally be related to the public purpose of the plan as a whole.

Petitioners have not contended that the inclusion of some (but not all) of their properties in the urban renewal project area was irrational.

III. Petitioners' Exaction Argument Was Not Properly Pled

While Petitioners seek to have this Court consider their claim that the developer's alleged demand for cash to relinquish its contractual right to request the Village to condemn their property was improper, Petitioners did not adequately present this claim in their Amended Complaint. That Complaint contained six claims:

a) in the First Claim, Petitioners asserted that they have been deprived of "their privileges, rights and immunities" under the Constitution, including a right "not to be deprived of their property without due process of law or by governmental actions that are unrelated to any legitimate governmental interest." (Am. Compl., ¶¶74,75).

b) in the Second Claim, Petitioners allege they have the right "secured by the Takings Clause of the Fifth Amendment to the United States Constitution, not to have their property taken by the State through the power of eminent domain for a private use, regardless of whether just compensation is given." (*Id.* ¶78);

c) in the Third Claim, Petitioners charge that Respondents' "abuse of the condemnation powers is so outrageously arbitrary, capricious, and irrational as to constitute a gross abuse of governmental authority which has violated [Petitioners']

substantive due process rights under the Fourteenth Amendment to the United States Constitution". (*Id.* ¶82);

d) in the Fourth Claim, Petitioners argue that they have been denied equal protection of the laws, alleging that Petitioners have been intentionally "singled out" for "disparate, unlawful and malicious treatment." (*Id.* ¶85);

e) in the Fifth Claim, Petitioners allege that the Village delegated its eminent domain power to G&S and Gregg Wasser ("Wasser") and that the condemnation proceeding sought to acquire their properties for a "purely private purpose". (*Id.*, ¶88);

f) The Sixth Claim for Relief contains no substantive allegations but simply asserts a claim for injunctive relief. (*Id.*).

As is apparent, none of the pled claims presented a claim of unconstitutional exaction, an argument that surfaced only in the opposition to the motion to dismiss, thus explaining the District Court's characterization of the argument as "new". (Pet. App. at 11).

Even assuming Petitioners' exaction claim is not beyond review, Petitioners' claim still fails. Petitioners have premised their claim upon 42 U.S.C. § 1983. However, section 1983 provides a remedy and does not by itself create any substantive rights. *Wilson v. Garcia*, 471 U.S. 261, 278 (1985). To state a cause of action under Section 1983, Petitioners must allege that some person has deprived them of a federal right acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

In order for private parties, such as G&S, to be held liable under Section 1983, it must be shown that such private parties were willing participants in joint activity with the state actors. *Ginsberg v. Healy Car & Truck Leasing, Inc.*, 189 F.3d 268, 271 (2d Cir. 1999); *Annunizato v. The Gan, Inc.*, 744 F.2d 244, 249 (2d Cir. 1984). The complaint must allege, with some

particularity, overt acts of the private defendants which were jointly undertaken with the state actors or reasonably related to a conspiracy with state actors. *Elmarsi v. England*, 111 F. Supp. 2d 212, 217-218 (E.D.N.Y. 2000), citing *Fariello v. Rodriquez*, 148 F.R.D. 670, 677 (E.D.N.Y. 1993), *aff'd*, 22 F.3d 1090 (2d Cir. 1994).

According to the Amended Complaint, the only acts allegedly committed by G&S and Wasser in the three years prior to suit are their attendance, at the "direction of" the Village, at a settlement meeting on November 5, 2003. At this meeting, Wasser allegedly demanded $800,000 or else he would cause the Village to commence condemnation proceedings against the properties owned by Petitioners within the MUR District. (Am. Compl. ¶48). Wasser is also said to have alternatively demanded a partnership interest in the CVS Project. (*Id.*). Wasser allegedly based his $800,000 demand upon his estimate that the profit on the CVS Project was worth $2,000,000. (*Id.* at 49). Shortly after Petitioners rejected Wasser's alleged proposals, condemnation proceedings were brought. (*Id.* at 50).

There is no allegation that the Village had any foreknowledge of Wasser's proposal, much less that the Village joined in it or was willing to support it, even though the Village's approval would be necessary to change the boundaries of the MUR District and to amend the LADA so to eliminate G&S' obligation to develop this part of the project. As Petitioners were well aware in 1999 (Pet. App at 26), such changes required a vote of the elected Village Board of Trustees.

While Petitioners point to their general allegation that G&S engaged in an "unlawful course of conduct with the actual knowledge or approval of" the Village (Pet. at 5 n.3), this does not satisfy the requirement that, to make out a case against a private party under Section 1983, the complaint must allege particular acts which are claimed to have been jointly undertaken

with the state actors. While the Amended Complaint alleges that G&S made a demand, it does not allege that governmental representatives were present and, if so, whether they concurred, and, if not, whether they later concurred.

Further, Petitioners' attempt to characterize G&S' settlement proposals as a payment to avoid condemnation is belied by the provisions of the LADA. Under the LADA, G&S had the right to develop all of the property in the MUR District, a right that it had obtained by making the winning proposal to the Village (Am. Compl. Ex. 1 at 2). It had both the right and the responsibility to acquire (and pay for) title to all of the property in the MUR District. (*Id.* at 11). Failure to do so could constitute a default, giving rise to actions by the Village against G&S. (*Id.* at 51). G&S had a concomitant responsibility under the LADA to undertake the development in accordance with the approved plans, including the responsibility to develop and construct the required public improvements. (*Id.* at 37). Thus, even if Wasser did offer to forego G&S' right to ask the Village to condemn Petitioners' property, he was offering to relinquish a legal right he had under the LADA. Petitioners have not here suggested that there is anything wrong with a private party asking for compensation to relinquish a legal right, particularly where doing so would have exposed him to liability (i.e., the Village's right to sue G&S for failing to develop all of the District) .

As the District Court found below (Pet. App. at 14), state law does not require the condemnor to negotiate with a private property owner in good faith prior to seeking to acquire title to the property. Thus, the Village did not have any obligation to negotiate with Petitioners and G&S and Wasser, non-parties to the condemnation proceeding, also had no obligation to negotiate with Petitioners. That the Village, G&S and Wasser did meet with Petitioners and conveyed a proposal that Petitioners found unacceptable does not give them any substantive claims.

A failure to acquire the Petitioners' properties would have had ramifications on the Village as well. The redevelopment of Port Chester had been contemplated for over twenty years, and the Village wanted to complete the project. Prior to the issuance of the Determination and Findings, Petitioners were unable to convince CVS to develop their properties. (Pet. App. at 24-25). That being said, taking Petitioners' properties out of the MUR would not fulfill the Village's goal of eliminating a blighted area. Finally, since Petitioners allege that they rejected the offer (Am. Compl. At ¶48), Petitioners have not articulated any basis for damages. *Printers II, Inc. v. Prof'ls Pub'g, Inc.*, 784 F.2d 141, 148 (2d Cir. 1986).

Petitioners' claim is in reality a collateral attack against the public use determination. The Village issued its Determination and Findings, which included its public use determination, in July 1999. Petitioners did not challenge the Determination and Findings. The fact that G&S had both the right and the responsibility to acquire (and pay for) title to all of the property in the MUR District does not convert the use from public to private. Moreover, once the public use determination was made, the fact that condemned properties were turned over to a developer to effectuate the public use, does not convert that use to a private one. *See Berman*, 348 U.S. at 35-36 ("Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.").

IV. Petitioners' Constitutional Exactions Argument Presents No Compelling Reason To Grant The Petition

In any event, Petitioners' theory that Respondents' conduct is actionable under *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1974) does not present any compelling reason for granting the writ.

While Petitioners maintain that since *Dolan* this Court has only discussed the exactions doctrine in *dicta* (Pet. at 22), any discussion of the exactions doctrine in the context of this case would likewise be *dicta*: first, because the case has been dismissed as untimely, and second, because the exactions doctrine is not implicated in this matter.

The law permits governmental entities to impose conditions upon land use applications provided there is an essential nexus between the harm to be avoided and the condition. In *Nollan*, *supra*, the applicant sought a permit to demolish a seaside home and rebuild and the government conditioned the permit on the granting of an easement for public beach access. In *Dolan*, *supra*, the municipality required the land owner to dedicate a portion of his property sought to be developed to a storm drainage system and for a pedestrian/bicycle pathway as a condition for a building permit.

As the District Court properly recognized, Petitioners did not have any conditions placed upon the use of their property while they were in ownership. (Pet. App. at 11). Further, unlike the situations in *Nollan* and *Dolan*, here is no allegation that the duly authorized governmental officials imposed any conditions through an officially sanctioned communication or resolution.

Based on the facts set forth in the Amended Complaint, there was a pre-existing 1999 finding of public purpose for condemnation that went unchallenged by Petitioners, (Am. Compl. ¶31), even though they received notice of the hearings (*Id.)* and knew that some of their property was located within the zone. (Pet. App. at 24-27). All that Petitioners claim is that the Village refused to process their application to re-zone their property so as to remove it from the project area. (Am. Compl. ¶¶53-54). However, since there was a valid, unchallenged public purpose finding, Petitioners had no substantive right to demand

that their property be excluded from the urban renewal area, particularly where Petitioners have never claimed that the inclusion of some of their properties within the urban renewal area was irrational.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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In The
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BART DIDDEN, DOMENICK BOLOGNA,
CABERNET 119 REALTY CORP., OPUS 113 CORP.,
PAUILLAC 115 REALTY CORP.,
AND 117 NORTH MAIN STREET CORP.,

Petitioners,

v.

THE VILLAGE OF PORT CHESTER, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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The Respondents' opposition brief makes abundantly clear that review is needed by this Court. Respondents do not actually challenge Petitioners' interpretation of the import of the Second Circuit's decision. But they clearly believe there is nothing wrong with private developers, acting with the authority and support of government, demanding cash from property owners in exchange for not taking their land. That is a startling proposition that, until now, could not be seriously asserted on the basis of existing case law.

Rather than addressing whether this case presents an appropriate vehicle for this Court to clarify the application of *Kelo* and to resolve a judicial split about cash exactions, Respondents put forward a flurry of imaginary procedural barriers to hearing the merits of this case. To name a few, Respondents incorrectly claim that Petitioners failed to plead various matters; that a time-bar on claims arising in 1999 would bar a 2003 cause of action; that this Court should not review unpublished appellate decisions; and that they may argue facts not in the pleadings on a motion to dismiss. Perhaps Respondents hope that by obscuring the issues sufficiently, the Court wil be convinced that this case is actually a complicated one. It is not. Unfortunately, Petitioners have had to respond to demonstrate why the various contentions are factually or legally incorrect. This Court should not get the impression, however, that the time spent responding indicates that any of these supposed concerns has the slightest legal merit.

Petitioners' case is quite simple. They have alleged that in 2003 a developer, acting on behalf of a municipal body, demanded cash in exchange for not taking their land. When Petitioners refused, their property was condemned the following day. The courts below held that these facts did not give rise to a claim of private purpose or pretextual condemnation and that there was no exaction; the case was dismissed under FRCP 12(b)(6). That is the whole of the case before this Court, and the issues that Petitioners have asked this Court to resolve are equally direct: (1) Was the Second Circuit correct that *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), precludes Petitioners from raising a claim of condemnation for private purpose because their property was situated within a redevelopment area? and

(2) Was the Second Circuit correct that these facts do not give rise to a claim of unconstitutional exaction? This case presents a clean vehicle for analyzing each of these claims. This Court should accept review.

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE APPLICATION OF *KELO* TO PURELY PRIVATE AND PRETEXTUAL TAKINGS WITHIN REDEVELOPMENT AREAS.

While purporting to disavow the idea that redevelopment designations create constitution-free zones, Respondents emphasize, over and over, that Petitioners did not challenge the original 1999 designation. Petitioners agree – they did not challenge the original designation. From their brief, it seems Respondents cannot even understand that Petitioners are attempting to challenge not the original designation, but later events. Because Petitioners sought to argue that the condemnation of their property in 2003 was for a purely private purpose and that any claim of public purpose was pretextual, any statute of limitations relating to events occurring in 1999 is irrelevant.

A. There Is No Statute Of Limitations Issue, Because Petitioners Wish To Bring A Constitutional Challenge To Events That Occurred In 2003.[1]

Respondents claim, incorrectly, that there is no point to the Court's review, because even if the Court ruled in Petitioners' favor, the Second Circuit's ruling that the public purpose claim is time-barred would remain an independent grounds for dismissal.[2] Resp. Br. 10-13. In fact, however,

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[1] The statute of limitations for actions under 28 U.S.C. § 1983 in New York is three years. *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004).

[2] Although Respondents seem to say that the entire action should be time-barred, the Second Circuit's statute of limitations ruling applies only to the public purpose challenge, not to the exaction challenge. *See*

(Continued on following page)

Petitioners have asked this Court to determine whether the attempted extortion and associated events *of 2003* give rise to a cause of action. If Petitioners have claims arising in 2003, then the Second Circuit's ruling that 1999 claims are time-barred is simply irrelevant. The Second Circuit's decision that Petitioners' claims were time-barred is necessarily based on its holding that Petitioners *had no claims arising in 2003*. In other words, the Second Circuit found that Petitioners could not challenge the specific taking in 2003 because they were bound by the 1999 determination of public purpose, and any challenge to the 1999 redevelopment designation was barred by the statute of limitations.[3] *See* Pet. Br. 7-8. *See also* Br. for Law Professors as *Amici Curiae* 14 (explaining that it is unreasonable to expect Petitioners to predict in 1999 that there will be an attempt at extortion and condemnation for private purpose in 2003).

Put another way, the statute of limitations ruling derives entirely from the substantive holding that pretextual, purely private purpose takings in a redevelopment area are constitutionally permissible under *Kelo*. The Second Circuit held that the public purpose of any possible condemnations was established, conclusively and as a matter of law, in 1999 and any challenge to the public

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Didden v. Vill. of Port Chester, 173 Fed. Appx. 931, 933 (2d Cir. 2006) (holding that there was no "unconstitutional exaction"). Respondents' specious arguments about the statute of limitations should be summarily rejected as to the public purpose challenge, but they cannot even be imagined to have any relevance to the exaction claim.

[3] Respondents' attempt to analogize this case to *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973) is unavailing. In *Paschall*, the Court remanded for consideration of a statute of limitations issue that had gone completely unnoticed in the state appeal and supreme courts. Since it had not been ruled upon by the earlier courts or briefed before this Court, it was appropriate to remand for lower courts to rule on in the first instance. *See* 414 U.S. at 100-102. Here, in contrast, the issue has been considered by the lower courts and the briefs, and Petitioners have repeatedly explained that the statute of limitations ruling does not affect the constitutional questions raised by Respondents' actions in 2003. *See Didden*, 173 Fed. Appx. at 933.

purpose was thus barred by the statute of limitations. *Didden*, 173 Fed. Appx. at 933. If an owner wants to challenge the public purpose of taking his property, therefore, the only legal option is to argue that the redevelopment designation is invalid and the entire project lacks a public purpose. That legal option – and therefore all legal options – apparently vanishes with the passing of the three-year statute of limitations. Since an owner cannot argue that a particular condemnation within a redevelopment area is for a private purpose and pretextual, Petitioners have no public use claim regarding the $800,000 demand in 2003.

In short, the Second Circuit's statute of limitations holding depends entirely on the substantive conclusion that the only way to challenge a condemnation within a redevelopment plan area is to challenge the original designation itself. Respondents cannot prevail on the statute of limitations issue without first prevailing on the substantive question of whether pretextual takings in a redevelopment area are permissible; the time bar is not and cannot be an independent reason for dismissing the Petitioners' cause of action.

Respondents' pages of discussion about live controversy, mootness and independent state law grounds are all simply beside the point. *See* Resp. Br. 10-13. Either Petitioners may bring a challenge that the condemnation of their particular property was pretextual and wholly lacking in public purpose (in which case there is no statute of limitations problem because the relevant events took place in 2003) or they may not bring such a challenge (in which case they are time-barred because they did not challenge the overall redevelopment designation in 1999). The fact that any claims arising in 1999 are now time-barred has nothing to do with whether Petitioners have claims arising in 2003.

B. The Fact That The Decision Is Unpublished Should Not Dissuade This Court From Granting Review.

Respondents also argue that the Court has no need to grant certiorari because the Second Circuit's decision has no precedential value. *See* Resp. Br. 14-15. This

argument has no merit. This Court grants review to unpublished decisions, including unpublished Second Circuit decisions, with some frequency.[4] Moreover, despite the Second Circuit's rule instructing that its unpublished decisions should not be cited, 2d Cir. R. 0.23, courts (including the Second Circuit itself) in fact frequently cite such opinions as persuasive precedent.[5] In short, the fact that the Second Circuit chose not to publish should not dissuade this Court from granting review. To the contrary, the fact that the Second Circuit treated a claim of the extortionate use of eminent domain as an easy and obvious example of public purpose, not even worth publication, should encourage the Court to grant review.

C. This Case Provides The Court With An Opportunity To Clarify An Important Issue Explicitly Left Open In *Kelo*.

Petitioners ask this Court to clarify an issue referred to but not directly addressed in *Kelo* – whether courts can review a claim that a particular taking within a redevelopment area has a purely private purpose. *See* Pet. Br. 10-11.

Petitioners believe there are two separate steps to public use analysis when there is "an integrated development plan": (1) whether the original redevelopment plan and authorization of eminent domain is proper and

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[4] *See, e.g., Banks v. Dretke*, 540 U.S. 668, 687 (2004) (reviewing unpublished Fifth Circuit decision); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 430 (2001) (reviewing unpublished Ninth Circuit decision); *Blum v. Stenson*, 465 U.S. 886, 891 (1984) (upholding unpublished Second Circuit oral opinion from the bench); *Bifulco v. United States*, 447 U.S. 381, 385 (1980) (overturning unpublished Second Circuit order); *Branti v. Finkel*, 445 U.S. 507, 509 (1980) (reviewing unpublished Second Circuit memorandum opinion).

[5] *See, e.g., Stewart v. Wolfenbarger*, 468 F.3d 338, 352 (6th Cir. 2006); *United States v. Wise*, 447 F.3d 440, 446 (5th Cir. 2006); *Cirilo-Munoz v. United States*, 404 F.3d 527, 533 (1st Cir. 2005); *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 368 (2d Cir. 2003) (citing *Herman Miller, Inc. v. Worth Capital*, 1999 U.S. App. LEXIS 3837, 1999 WL 132183, at *1 (2d Cir. 1999) (summary order)).

for an overall public use and (2) whether the particular condemnation actually had a purely private purpose, with any claim of public purpose being merely pretextual. The Second Circuit held (and Respondents argue) that there is no second step. If the original redevelopment designation is valid, no further judicial review is possible, case closed. *Didden*, 173 Fed. Appx. at 933. If, however, there is a second step in which an owner may argue that the evidence shows a purely private purpose in taking his property, then Petitioners' claims should not have been dismissed.

Respondents argue that this question has been resolved by a series of cases from this and other courts holding that the necessity of inclusion of a particular property within a redevelopment area, the necessity of condemnation of a particular property for a project, or the quantity of land taken are not proper subjects for judicial review. *See* Resp. Br. 16-20.

But this case is not a challenge to necessity or the setting of project area boundary lines. Petitioners argue that the taking of their property was pretextual and had a private purpose, that it was motivated by private greed and a desire to maximize the developer's private profits. Neither *Kelo* nor *Berman* involved allegations like the ones in this case of specific and malicious private motivation in taking property.

Kelo suggested that there could be cases where there is a plausible claim of private purpose and pretextual taking. *See* 125 S. Ct. at 2661 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."). Courts from many other jurisdictions agree. *See* Pet. Br. 12-13; Br. for Law Professors *Amici Curiae* 10-12 (collecting cases and discussing conflict between the Second Circuit's decision in this case and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)). Yet in this case, the lower courts instead dismissed the claims without hearing them or giving the owners an opportunity to substantiate their allegations. This case thus presents the Court with an opportunity to give substance to its brief discussion in

Kelo and explain whether courts may consider claims of private and pretextual takings within redevelopment areas.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW OF CASH EXACTIONS.

Petitioners believe that the demand for $800,000 as a condition of not having their property taken by eminent domain was an unconstitutional exaction that did not satisfy the "substantial nexus" requirement laid out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[6] Both the Southern District and the Second Circuit ruled that there was no unconstitutional exaction. *Didden v. Vill. of Port Chester*, 322 F. Supp. 2d 385, 389 (2004); *Didden*, 173 Fed. Appx. at 933. As explained in Petitioners' opening brief, the federal courts have tended to limit the scope of the *Nollan/Dolan* substantial nexus requirement to demands for interest in real property. Pet. Br. 19 (citing cases). Many state supreme courts, on the other hand, have found cash demands to be exactions and have applied the *Nollan/Dolan* test. Pet. Br. 20 (citing cases). There is a plain split among the lower courts as to whether *Nollan/Dolan* should apply to demands for cash in exchange for engaging or not engaging in a discretionary government action. That is why Petitioners have asked this Court to review the issue and resolve the decade-long split of authority.

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[6] In yet another utterly incorrect statement, Respondents assert that Petitioners did not plead this cause of action in their Complaint. Resp. Br. 20. In fact, the Amended Complaint goes far beyond minimum pleading requirements. Petitioners pled violations of public use, procedural due process, and substantive due process, Am. Compl. ¶¶ 74-75, 78-79, 82-83, and stated quite specifically that the developer was "using the Condemnation Proceeding *to exact a payment* from Plaintiffs or coerce some other financial arrangement to which they are not lawfully entitled." *See* Am. Compl. ¶ 64 (emphasis added). Moreover, the claim that the $800,000 demand was an unconstitutional exaction was briefed and decided at each stage of this litigation.

The points made by Respondents cannot even be called a response, as they entirely fail to address Petitioners' argument. Respondents do not deny that there is a split among the lower courts or a need for greater doctrinal clarity. *See* Resp. Br. 20-26. Instead, they argue (1) that there was no exaction because the Village could simply have condemned with no negotiations; (2) the $800,000 demand was a reasonable negotiation offer; (3) Petitioners did not properly allege state action; and (4) Petitioners have no basis for complaining about the Village's failure to process their rezoning application.

Respondents' points are all utterly irrelevant. In brief, (1) all exaction claims, including this one, involve demands in exchange for the government taking or not taking an action within government discretion; (2) Respondents may attempt to prove a substantial nexus at trial, but factual claims of reasonableness are not relevant to a motion to dismiss nor to whether this Court should accept review; (3) Petitioners plainly alleged state action; (4) Petitioners made no arguments to this Court that have anything to do with a rezoning application.

First, all claims of unconstitutional exaction involve situations where there is no obligation to negotiate and the government has "discretion[]" to take one action or another.[7] *See Dolan*, 512 U.S. at 385. Illustrating this principle, this Court in *Nollan* explained that, while a locality could surely use its police power to entirely forbid shouting fire in a crowded theater, it could not "requir[e] a $100 tax contribution in order to shout fire." *Nollan*, 483 U.S. at 837. Thus, even if the Respondents could have taken Petitioners' property without any negotiation, that does not mean that Respondents could use their power to extract improper

[7] The district court's holding that there is no problem when a person acting under color of state law demands cash in exchange for exercising or not exercising government authority is patently ridiculous. *See* Br. for Pacific Legal Foundation as *Amicus Curiae* 4-11. If the district court were correct, then *Nollan*, *Dolan*, and every other exaction case and unconstitutional conditions case have been wrongly decided.

concessions from Petitioners. Petitioners' claim is that, even if Respondents had the authority to condemn their property, the exaction of $800,000 in exchange for not taking their property violated the Constitution.

Second, Respondents' comments about the reasonableness of the demand in light of various governmental and developer obligations might be appropriate on remand but are wholly inapposite on an appeal from a motion to dismiss. Respondents complain that Petitioners are unfairly "characteriz[ing]" the $800,000 demand, when really it was a quite reasonable and benevolent settlement offer. Resp. Br. 23. On a motion to dismiss, however, the courts do in fact take as true the plaintiff's characterization of events, not the defendant's.[8] *E.g.*, *H. J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249 (1989).

Third, the claim that Petitioners didn't allege state action is absurd. *See* Resp. Br. 23. They alleged in their Amended Complaint that they met with the developer at the instruction of the Village; that in response to Petitioners' complaints about the attempted extortion, the Village's Special Counsel told Petitioners they would have to reach agreement with the developer and that they should communicate with the developer through him (the Special Counsel); and that the developer both "cause[d]" and "control[led]" the condemnation proceedings. Am. Compl. ¶¶ 48, 56, 60 (reproduced in Pet. Br. 5-6 n.3); *see also* Am. Compl. ¶¶ 51-52, 54 (describing Petitioners' complaints to Village about extortion attempt). These allegations amply satisfy the pleading requirement for state action.

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[8] Respondents absurdly suggest that the Village's and developer's motivations and the nature of the events and conversations that actually took place can all be inferred, presumably as a matter of law, from the face of a 200-page contract. Resp. Br. 23. They also rely on findings of the district court on the motion for preliminary injunction, another plainly improper legal maneuver. Resp. Br. 24. *Cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

Finally, the last point of Respondents' brief is incomprehensible to Petitioners, as they have not asked this Court to consider anything about their rezoning application. *See* Resp. Br. 2, 25.

In short, the question of the nature of constitutional limitations on demands for cash in exchange for discretionary government action is a subject of deep division in the lower courts. As discussed in the amicus brief by Pacific Legal Foundation, abusive demands for cash are an increasing problem in local government. Br. of Pacific Legal Foundation as *Amicus Curiae* 11-16. This is a perfect time for the Court to consider the proper application of the exaction doctrine and to clarify how courts should analyze these claims in the future. Respondents have said nothing that should have the slightest bearing on this Court's decision whether to grant review.

CONCLUSION

Sweeping away all the legal niceties, this case raises a stark question – is there anything constitutionally wrong with demanding $800,000 in exchange for not taking someone's property by eminent domain, or does the fact that the property sits within a designated redevelopment area preclude any constitutional challenge? To answer this question, this Court should grant Petitioners' request for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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PAUILLAC 115 REALTY CORP., AND
117 NORTH MAIN STREET CORP.,
Petitioners,

v.

THE VILLAGE OF PORT CHESTER ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

~~MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND~~ BRIEF OF LAW PROFESSORS D. BENJAMIN BARROS, ERIC R. CLAEYS, VIET D. DINH, STEVEN J. EAGLE, JAMES W. ELY, Jr., RICHARD A. EPSTEIN, ADAM MOSSOFF, AND ILYA SOMIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS.

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Pursuant to Rule 37.2(b) of the Rules of this Court, law professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossoff, and Ilya Somin respectfully move for leave to file the attached brief as amici curiae in support of the Petitioners. Both Petitioners and Respondents have consented to the filing of this brief.

For the foregoing reasons, amici curiae respectfully request that they be allowed to participate in this case by filing the attached brief.

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QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment, which permits condemnation of property only for a "public use," permit pretextual takings initiated for the purpose of advancing private interests?

2. Does *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) permit the condemnation of property as part of a scheme to extort money from the current owners in order to benefit other private parties merely because the property in question is located in a "redevelopment area"?

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INTERESTS OF AMICI CURIAE[1]

The amici are law professors specializing in property law, constitutional law, or both. Each of us has written extensively on property rights, eminent domain, or economic development, and several have written on *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) and its implications. Although we differ amongst ourselves about the proper role of the judiciary in enforcing constitutional limits on the takings power, we are united in our belief that *Didden* presents an important opportunity for this Court to make clear that *Kelo* is not a blank check for pretextual condemnations.

Each of the amici has read and considered the contents of this brief, suggesting revisions where necessary. The law professor amici are D. Benjamin Barros, Widener University School of Law; Eric R. Claeys, Saint Louis University School of Law; Viet D. Dinh, Georgetown University Law Center; Steven J. Eagle, George Mason University School of Law; James W. Ely, Jr., Vanderbilt University Law School; Richard A. Epstein, University of Chicago Law School and the Hoover Institution; Adam Mossoff, Michigan State University College of Law; and Ilya Somin, George Mason University School of Law.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented in the Petition. Throughout the discussion we shall assume in accordance with established rules of civil procedures that all these allegations are true. *See* Federal Rule of Civil Procedure 12(b)(6).

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[1] Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE PETITION

The present case addresses an important ambiguity in this Court's decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). *Kelo* requires courts to defer to legislative judgments of public use in cases where property is condemned in the context of an "integrated development plan." *Id.* at 2667. Although this Court's decision in *Kelo* moved the margin on permissible public use, it did not eliminate the ban on pretextual takings. To the contrary, *Kelo* reiterated the rule that courts should invalidate condemnations undertaken "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 2661.

A pretextual taking is one where the "ostensible public use" is in reality just a cover for "the desire to achieve the naked transfer of property from one private party to another." *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003). One powerful sign of that form of political abuse is the unilateral decision by a single person to take the property for its own use under authority delegated by the state, without any form of hearing and without any pretense that the taking in question will advance some comprehensive plan that otherwise would not be implemented.

This case presents a textbook example of the kind of conduct that the *Kelo* decision recognized to be subject to judicial oversight under the Public Use Clause. *Didden* involves an alleged pretextual taking within an official "redevelopment area." The condemnation does not advance the objectives of any integrated plan. Before the taking, Petitioners had determined at their own expense that the site was appropriate for a new pharmacy. After condemnation, another pharmacy is scheduled to be put on the site after the defendant exercised its eminent domain power to in effect

expropriate the Petitioners' business plans. It is highly doubtful that the municipality could have engaged in such highhanded treatment of property owners on its own initiative. It is manifestly outrageous that it could transfer the power of eminent domain so to a private developer and allow him to use it to advance his own interests without any benefit to the public. Yet that is precisely what happened when Gregg Wasser, the designated developer, decided that the Petitioners' property should be taken because they refused to pay him the $800,000 he demanded as the price for avoiding condemnation.

The Second Circuit's decision to uphold this pretextual taking did not probe any of the reasons why the public use requirement remains, even after *Kelo*, an important bulwark against condemnations that "raise a suspicion that a private purpose [is] afoot." *Kelo*, 125 S. Ct. at 2667. Its perfunctory opinion gave Wasser a free pass merely because his use of the condemnation power occurred in a redevelopment area. That holding creates a circuit split with the Ninth Circuit, which in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), held that pretextual condemnations in redevelopment areas are not permitted. This Court should act to resolve this important disagreement.

The root of the Second Circuit's error is its implicit conflation of condemnations that are part of an "integrated development plan" with ones that merely occur within a redevelopment area. *Kelo*, 125 S. Ct. at 2667. *Kelo* does not explicitly address the question of whether such a conflation is proper. If the Court allows clearly pretextual condemnations to go forward merely because they occur within a redevelopment area, then the proliferation of these areas will open the door to widespread abuses of political power. Self-interested private parties would bid and lobby local governments to create redevelopment areas that they could then turn into cash cows for themselves. The threat of condemnation to extort money from property owners would

not be the exclusive province of Gregg Wasser. He would become a role model for others.

Judicial deference does not apply to pretextual takings when local governments simply defer to the self-interested agendas of private parties. The expertise of municipal governments offers no protection when they make no effort to decide which condemnations best serve "public needs." *Kelo*, 125 S. Ct. at 2664. One-to-one pretextual takings of this kind, where there is no change in land use, do not raise any hint of the "holdout" problems that may justify resort to eminent domain in other situations. *Id.* at 2668 n.24.

ARGUMENT

I. THIS CASE OFFERS AN EXCELLENT OPPORTUNITY TO ADDRESS THE IMPORTANT QUESTION OF WHETHER *KELO* PERMITS PRETEXTUAL TAKINGS IN ANY SITUATION WHERE THE CONDEMNATION OCCURS IN A "REDEVELOPMENT AREA."

The present case tests the limits of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), as the Court has yet to resolve the crucial question of whether pretextual takings are permissible within a "redevelopment area." It is difficult to imagine a clearer example of a pretextual condemnation in a redevelopment area than *Didden*. The challenged condemnation occurred only because the Petitioners refused to pay a private developer the $800,000 he demanded as the price for avoiding the taking of their property. Pet. Cert. at 5. If in fact, the compensation awarded in such cases left the property owner indifferent to the condemnation, then this threat would never be credible. The property owner would instead welcome the condemnation in order to save the $800,000 or to get full value for his full property rights in the project. But the credible nature of this threat shows

conclusively that the condemnation figures offered are typically too low, for they do not protect the value of the business plans embodied in the site. The low measure of compensation therefore make it imperative to limit the threat advantage that private parties can obtain by gaining control over local development plans. It seems clear that the municipality could not make that threat itself. Nor then should it be able to delegate this power to a private party. The case presents an excellent opportunity to address whether pretextual takings are constitutionally permissible within a redevelopment area.

A. *Kelo* requires judicial deference in cases where a taking is part of an integrated development plan, but forbids pretextual takings.

1. *Kelo* does not sanction pretextual takings.

Kelo upheld the constitutionality of condemnations for purposes of "economic development" on the ground that that condemnations executed as part of an "integrated development plan" deserve a high degree of judicial deference. *Id.* at 2667. But it also emphasized that government may not condemn property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 2661. Its illustration of this point was the kind of case we have here: a "one-to-one transfer of property, executed outside the confines of an integrated development plan." *Id.* at 2667. That kind of self-dealing is suspect because it "raises the suspicion that a private purpose was afoot." *Id.* at 2665.

Justice Kennedy's concurring opinion—written by the swing voter in a 5–4 decision[2]—also underscores the need to rein in pretextual takings. Justice Kennedy reiterated the principle that "transfers intended to confer benefits on particular, favored, private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 2669 (Kennedy, J., concurring). He also emphasized that courts must "strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* In cases where there is "a plausible accusation of impermissible favoritism to private parties," he would require courts to "treat the objection as a serious one and review the record to see if it has merit." *Id.*

2. Pre-*Kelo* precedents also do not endorse pretextual takings.

The Supreme Court's pre-*Kelo* public use decisions also do not permit pretextual takings. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) required courts to defer to legislative judgment in cases where there is a legitimate public use, but also reiterated the principle that "'one person's property may not be taken for the benefit of another private person without a justifying public purpose.'" *Midkiff*, 467 U.S. at 241 (quoting *Thompson v. Consol. Gas Util. Corp.*, 300 U.S. 55, 80 (1937)). There is no true "justifying public purpose" for pretextual takings that only serve the self-interested machinations of a private party.

In this connection, the Court's earlier decision in *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930), emphasized that "a bare recital" of an alleged public use by a local government fails to satisfy constitutional requirements.

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[2] Because Justice Kennedy chose to sign on to the majority opinion rather than concurring in judgment only, his opinion is not a binding precedent. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (noting the rules that apply to cases with multiple opinions).

Property cannot be condemned on the basis of claimed public uses that are "foreign to the actual purpose of the appropriation." *Id.* at 446. *Vester* was favorably cited in *Kelo* and remains good law. *See Kelo*, 125 S. Ct. at 2667 n.17 (citing *Vester* as a case that justifiably invalidated a condemnation for which no "reasoned explanation" was offered).

B. The present case presents an ideal opportunity to reexamine the law of pretextual takings within a redevelopment area.

1. Petitioners' property was condemned because of their refusal to pay a private party $800,000 in order to avoid condemnation.

Pretextual takings are cases where the "ostensible public use" that supposedly justifies a condemnation is just a cloak for the "the desire to achieve the naked transfer of property from one private party to another." *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003). The condemnation of the Petitioners' property is an unusually blatant example of that phenomenon.

Gregg Wasser, the developer who was awarded the contract to rebuild the Redevelopment Area, decided to condemn the Petitioners' property because they refused his demand that they either pay him $800,000 or make him a 50% partner in their plan to build a CVS store on site. Pet. Cert. at 5.

On these facts, the Court therefore must assume that there is "a plausible accusation of impermissible favoritism to private parties." *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring). Wasser's planned use for the property—a

Walgreens drug store—is virtually identical to the Petitioners' plan to build a CVS drug store. *See* Pet. App. at 22-24. There is no indication that the Village went ahead with the condemnation because its planners somehow believed that a Walgreens would better promote local economic development than a CVS; nor does the record reveal any other public interest that would be served by condemning the property and transferring it to Wasser.

The Village simply rubberstamped the activities of the private developer. This form of unthinking validation has already drawn the ire of state courts, For example, in *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (hereinafter "*SWIDA*"), the Supreme Court of Illinois held that the decision of a local planning authority to condemn private property in order to furnish a nearby race track with additional parking facilities did not meet public use requirements under state law. That case featured the same willingness of public bodies to defer private parties that is involved in this case. The Illinois decision noted that "SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use." *Id.* at 10. "Rather, this action was undertaken solely in response to [the racetrack owner's] expansion goals," which had no connection to the supposed public use put forward to justify condemnation. *Id.* The present case is strikingly similar, and perhaps involves even greater abdication of public responsibility to a self-interested private party.

2. The Second Circuit's decision to uphold this pretextual condemnation creates a circuit split.

The Second Circuit's cursory decision to permit the pretextual condemnation of the Petitioners' land, Pet. App. at 4, creates a circuit split with the Ninth Circuit's 1996 holding in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

In *Armendariz*, owners of low income housing alleged that the City of San Bernardino sought to condemn their property to build a privately owned shopping mall. *Id.* at 1314-15, 1321. The City claimed that its objective was to serve the public purpose of "the reduction of urban blight." *Id.* at 1314. The Ninth Circuit refused to defer to the City's assertion because "the Takings Clause would lose all power to restrain government takings" if officials "could take private property . . . simply by deciding behind closed doors that some other use of the property would be a 'public use,'" and "later justify their decisions in court" by concocting "'a conceivable public purpose' to which the taking is rationally related." *Id.* at 1321.

While *Armendariz* partly depended on the finding that the alleged public use was decided "behind closed doors" after the fact, *id.*, the Ninth Circuit also held that Supreme Court precedent did not require deference to the City of San Bernardino's claim of alleviating "blight" because the evidence indicated that this rationale was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price." *Armendariz*, 75 F.3d at 1321.

A primarily pretextual claim of public use does not deserve deference because it cannot be considered a true "legislat[ive] judgment of what constitutes a public use," but is rather a mere cover for condemnations designed to benefit private interests. *Midkiff*, 467 U.S. at 240. Numerous state

courts have also refused to defer to condemning authorities in cases where the asserted public use was pretextual.[3] Three United States district courts have since relied on *Armendariz* and refused to defer to pretextual takings that transfer condemned property to private interests.[4] One of these district

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[3] *See, e.g., AvalonBay Cmtys., Inc. v. Town of Orange*, 775 A.2d 284, 299-303 (Conn. 2001) (upholding injunction against condemnation of private property allegedly to alleviate blight because it was a pretext to preventing the construction of affordable housing); *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436-37 (Colo. Ct. App. 1989) (finding that flood control was a pretext for enabling sale of government property); *Wilmington Parking Auth. v. Land With Improvements*, 521 A.2d 227, 232-34 (Del. 1986) (finding parking construction was a pretext for extending benefit to private party); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 103-05 (N.J. Super. Ct. Law Div. 1998) (rejecting pretextual taking intended to benefit casino owned by Donald Trump); *City of Miami v. Wolfe*, 150 So. 2d 489, 490 (Fla. Dist. Ct. App. 1963) (affirming finding that extending roadway was a pretext for the acquisition of valuable riparian rights); *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455, 460-61 (Ga. 1981) (blocking condemnation nominally for a park but actually intended to prevent construction of waste disposal site); *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987) (holding that the construction of a park and moderate income housing was a pretext for excluding low income housing); *Essex Fells v. Kessler Inst.*, 673 A.2d 856, 858 (N.J. Super. Ct. Law Div. 1995) (disallowing borough from condemning property in order to prevent owner from constructing a nursing facility); *Redev. Auth. v. Owners*, 274 A.2d 244, 252 (Pa. Commw. Ct. 1971) (finding land taken on pretext of removing blight was actually to benefit another private party); *S.W. Ill. Dev. Auth. v. Nat'l City Env.*, 768 N.E.2d 1, 9-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (hereinafter "*SWIDA*") (striking down taking where the claimed public purpose was a pretext for an effort to benefit a private racetrack owner).

[4] *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001),

court decisions was favorably cited by the majority opinion in *Kelo* as an example of a case where a pretextual condemnation was rightly invalidated. *See Kelo*, 125 S. Ct. at 2667 n.17 (citing *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003)).

The supposed public use in the present case is even more blatantly pretextual than that in *Armendariz*. In the latter case, the municipal government made no condemnations solely because the owners of the relevant property had refused to pay a large sum of money to another private party. This circumstance further exacerbates the circuit split created by the Second Circuit's decision.

C. This case raises the important issue of whether all takings within a development area should be conclusively deemed to be part of an integrated development plan.

Kelo does not explicitly consider whether all condemnations within a redevelopment area, including pretextual ones, should be considered part of an "integrated development plan." The Second Circuit completely ignored this critical distinction, despite the manifest risk that private condemnations in redevelopment areas create many opportunities for pretextual takings. Pet. Cert. at 13.

If the Second Circuit is not overruled, private developers will be handed a blueprint on how to take private property for their own benefit, irrespective of any public interest. They will therefore lobby local governments to obtain these valuable rights, and in so doing undermine the security of expectations that allows redevelopment to take place without government intervention. The creation of such

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app. dismissed as moot, 2003 WL 932421 (9th Cir. Mar. 7, 2003) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual.").

areas will usher in a vast new arena for political intrigue by private interests seeking to extract money from current owners by threatening them with condemnation if they refuse to pay.

In *Kelo*, this Court noted that a condemnation executed for the purpose of implementing "an integrated development plan" deserves considerable judicial deference, and that courts should not "second-guess the City's considered judgments about the efficacy of its development plan." *Kelo*, 125 S. Ct. at 2667-68. However, the Court did not hold that a taking in a redevelopment area should receive a high degree of judicial deference if undertaken for purposes of pure private enrichment.

The unconstitutionality of pretextual takings is well illustrated by the case of *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003), a decision favorably cited in *Kelo* as a case where a court justifiably invalidated "a one-to-one transfer of property, executed outside the confines of an integrated development plan." *Kelo*, 125 S. Ct. at 2267 & n.17.

In *99 Cents*, the challenged condemnation, like that in the present case, occurred within a redevelopment area. *See 99 Cents*, 237 F. Supp. 2d at 1125–26, 1130 (noting that the condemnation was part of the "Amargosa Redevelopment Plan" in the "Amargosa Project Area"). Yet the district court invalidated the taking because its true purpose was not to promote the objectives of the redevelopment plan, but to advance the private interests of Costco, the intended new owner of the condemned property. *Id.* at 1128-29. As the court put it, "No judicial deference is required . . . where the ostensible public use is demonstrably pretextual." *Id.* at 1129. The court rejected the City of Lancaster's claim that the purpose of the condemnation was to prevent "future blight" because the true purpose of the taking was "nothing more than the desire to achieve the naked transfer of property from one private party to another." *Id.* at 1129-30.

The present case is a more blatantly "naked" transfer than *99 Cents*. In *99 Cents*, Costco did not seek to condemn the property of the 99 Cents store merely because the latter refused to knuckle under to a threat of extortion. Rather, Costco apparently believed that expansion of its operations into the property occupied by the 99 Cents store would increase the profitability of its own business, a result that the City of Lancaster might find conducive to economic development in the area. *Id.* at 1130-31. In *Didden*, by contrast, Wasser's and the Village's sole motive for condemning the Petitioners' property was the refusal of the latter to pay Wasser the $800,000 he demanded.

D. The Second Circuit erred in holding that the Petitioners' suit is time-barred.

The Second Circuit's holding that the Petitioners' claim is time-barred is no obstacle to granting the petition for writ of *certiorari*. Pet. App. at 3. The Second Circuit held that the petitioners' claim accrued on July 14, 1999 when the Village of Port Chester Board of Trustees declared that the properties in question would be part of a "redevelopment area" where condemnation is permissible. *Id.* at 2. Its holding credits the Petitioners' with the clairvoyance to know in 1999 that Gregg Wasser would make crude efforts at extortion some four years later in 2003. The uncertain course of events in 1999 would have, moreover, likely precluded any federal challenge on the ground that the suit would not be ripe because of the incompleteness of the factual record. The Second Circuit thus puts petitioners in an untenable position by holding that the statute of limitations expired before the case was ripe. It is an evident denial of the most elementary forms of procedural due process to have *no* proper time for bringing suit.

1. The procedural holding that the Petitioners' case is time-barred is dependent on the substantive holding that there is no difference between pretextual and non-pretextual condemnations within a redevelopment area.

The Second Circuit's conclusion that the Petitioners' claim is time-barred is completely dependent on the Second Circuit's substantive ruling that there is no meaningful difference between a condemnation enacted as part of an integrated development and a pretextual condemnation enacted within a redevelopment area. Pet. App. at 2. While the Village of Port Chester Board of Trustees made Petitioners' property part of a "redevelopment area" on July 14, 1999, *id.*, the Petitioners at that time had no inkling of Gregg Wasser's extortionate demands, which were only made four years later, in November 2003. *Id.* Faced with this concrete threat of condemnation, the Petitioners filed suit in federal court two months later, in January 2004, well within the three year statute of limitations. *Id.* at 3. Thus, their claims could be considered time-barred only if the mere possibility of future condemnation as part of an integrated development plan is identical to the pretextual condemnation that in fact occurred.

2. The claim is not time-barred because Petitioners did not know that their property would be condemned until Wasser demanded that they pay him $800,000 to avoid condemnation.

When the Redevelopment Area was established in 1999, no steps were taken to condemn the Petitioners'

property. They therefore had nothing to oppose. The statute of limitations does not begin to run until all elements of the claim have accrued in order to avoid the spectacle of tens or hundreds of individual lawsuits with respect to properties that may never be taken it all. Indeed, if the Petitioners had tried to file a suit to block the Village's actions before November 2003, it might have been dismissed for lack of ripeness. "[F]ederal courts are precluded from adjudicating a claim of a taking for a private purpose" unless the property owner has "demonstrate[d] that he or she received a 'final decision' from the relevant government entity." *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 454 (7th Cir. 2002). Similarly, this court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) noted that "a takings claim challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." The law cannot ban all challenges to government action on the ground that they are either too soon or too late. The usual rule that requires all elements of the claim to accrue before the statute of limitations begins to run avoids that impossible dilemma.

If New York law, as interpreted by the Second Circuit, is so perverse as to require the filing of federal challenges to condemnations before those claims are ripe under federal law, that strengthens the case for granting the petition for writ of *certiorari*. The conflict between New York's requirements and federal ripeness standards would be an additional important issue for this Court to resolve.

II. PRETEXTUAL TAKINGS INTENDED TO BENEFIT PRIVATE PARTIES SHOULD NOT RECEIVE DEFERENCE FROM THE JUDICIARY.

Pretextual takings do not deserve judicial deference of the sort extended to "economic development" takings by the *Kelo* majority. *Kelo*, 125 S. Ct. at 2663-69. Unlike some economic development takings, one-to-one pretextual transfers of property do not involve holdout problems or other complex public policy issues that might justify judicial deference.

A. One-to-one pretextual takings do not deserve judicial deference.

The deference this Court afforded to integrated development plans in *Kelo* rested in large part on the Court majority's belief that condemnation decisions involve complex public policy judgments that justify giving legislatures "broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 125 S. Ct. at 2664. The Court insisted that legislative authorities have greater expertise in determining public needs than the judiciary. *Id.* This rationale, however, cannot apply in cases where the claimed reason for condemnation is purely pretextual. If the condemning authority does not make a meaningful effort to "determine . . . public needs," it has not sought to apply the expertise that warrants judicial deference under *Kelo*. *Id.*

In the present case, Wasser only decided to condemn the Petitioners' property because they refused to meet his demand for $800,000 or 50% of the profits from the CVS venture. His threat negates any meaningful connection between the Village's claimed public use of promoting economic development and the taking of Petitioners' property. Neither the Village nor its residents could have

benefited from either the $800,000 or the 50% partnership interest if the Petitioners had caved in to Wasser. Nor did Village authorities explain why this condemnation would transfer the site to more valuable community uses than the Petitioners' planned CVS drug store. Indeed, Wasser's intended use for the land—opening a Walgreens drug store—was very similar to the Petitioners' plan to open a CVS. *See* Pet. App. at 22-24 (describing the two plans).

Ultimately, Port Chester left it up to Wasser to decide whether or not to condemn the Petitioners' property, Pet. Cert. at 5, without considering whether or not the resulting condemnation would actually serve "public needs." *Kelo*, 125 S. Ct. at 2664. No court should defer to a legislative judgment of public need when no such judgment has been made. Port Chester simply acquiesced in a thinly veiled pretextual rationale for a condemnation undertaken at the behest of a self-interested private party.

B. One-to-one pretextual takings are not needed to overcome holdout problems.

As this Court suggested in *Kelo*, local governments may sometimes properly resort to the use of eminent domain to overcome holdout problems. *Id.* at 2668 n.24. The majority opinion held that this was a "matter of legitimate public debate" best left to the political process, which is in the best position to determine when the eminent domain power is needed to prevent holdouts from blocking socially valuable projects. *Id.* In fact, private developers have often overcome holdout problems without the aid of eminent domain.[5] But

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[5] *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. at 21-29 (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874865 (visited Nov. 24, 2006) (explaining how private developers can prevent holdout problems by resorting to secret assembly and precommitment strategies); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain*

even if condemnation is sometimes needed to avoid holdouts, that point is not at issue in this case because no holdout problem can arise in one-to-one takings such as that which occurred here.

Holdouts can occur in situations where large-scale projects require assembling a large number of lots owned by numerous different individuals. In such a scenario, even one "holdout" could potentially block an important development project or extract a prohibitively high price for acquiescence.[6] Even though the use of eminent domain may be desirable in those contexts, it is not so here, in the absence of any large-scale project that requires the acquisition of land held by many different owners. If Wasser genuinely values the property in question more than Petitioners do, he could easily acquire it through the ordinary workings of the real estate market. The current owners would have every incentive to sell, since they could get more money by selling the property than by using the land themselves. Wasser's attempted substitution of a Walgreens for a CVS store does not raise holdout issues nor any collective action problem that might potentially require the use of eminent domain. *Cf.* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN 162-69 (1985) (explaining how condemnation may be justified when necessary to overcome collective action problems).

Law: A Rationale Based on Secret Purchases and Private Influence, 92 CORNELL L. REV. 1, 19-31 (2006) (showing how secret assembly is a better way to avoid holdout problems than eminent domain).

[6] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-08 (1972) (classic description of the holdout problem); Lloyd R. Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991) (rigorously explaining the concept of the holdout); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81-82 (1986) (discussing the holdout rationale for eminent domain).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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December 8, 2006

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No. 06-652

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PAUILLAC 115 REALTY CORP., AND
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Petitioners,

v.

THE VILLAGE OF PORT CHESTER ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF LAW PROFESSORS D. BENJAMIN BARROS, ERIC R. CLAEYS, VIET D. DINH, STEVEN J. EAGLE, JAMES W. ELY, Jr., RICHARD A. EPSTEIN, ADAM MOSSOFF, AND ILYA SOMIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS.

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Pursuant to Rule 37.2(b) of the Rules of this Court, law professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossoff, and Ilya Somin respectfully move for leave to file the attached brief as amici curiae in support of the Petitioners. Both Petitioners and Respondents have consented to the filing of this brief.

For the foregoing reasons, amici curiae respectfully request that they be allowed to participate in this case by filing the attached brief.

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QUESTIONS PRESENTED

1. Does the Public Use Clause of the Fifth Amendment, which permits condemnation of property only for a "public use," permit pretextual takings initiated for the purpose of advancing private interests?

2. Does *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) permit the condemnation of property as part of a scheme to extort money from the current owners in order to benefit other private parties merely because the property in question is located in a "redevelopment area"?

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INTERESTS OF AMICI CURIAE[1]

The amici are law professors specializing in property law, constitutional law, or both. Each of us has written extensively on property rights, eminent domain, or economic development, and several have written on *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) and its implications. Although we differ amongst ourselves about the proper role of the judiciary in enforcing constitutional limits on the takings power, we are united in our belief that *Didden* presents an important opportunity for this Court to make clear that *Kelo* is not a blank check for pretextual condemnations.

Each of the amici has read and considered the contents of this brief, suggesting revisions where necessary. The law professor amici are D. Benjamin Barros, Widener University School of Law; Eric R. Claeys, Saint Louis University School of Law; Viet D. Dinh, Georgetown University Law Center; Steven J. Eagle, George Mason University School of Law; James W. Ely, Jr., Vanderbilt University Law School; Richard A. Epstein, University of Chicago Law School and the Hoover Institution; Adam Mossoff, Michigan State University College of Law; and Ilya Somin, George Mason University School of Law.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented in the Petition. Throughout the discussion we shall assume in accordance with established rules of civil procedures that all these allegations are true. *See* Federal Rule of Civil Procedure 12(b)(6).

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[1] Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE PETITION

The present case addresses an important ambiguity in this Court's decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). *Kelo* requires courts to defer to legislative judgments of public use in cases where property is condemned in the context of an "integrated development plan." *Id.* at 2667. Although this Court's decision in *Kelo* moved the margin on permissible public use, it did not eliminate the ban on pretextual takings. To the contrary, *Kelo* reiterated the rule that courts should invalidate condemnations undertaken "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 2661.

A pretextual taking is one where the "ostensible public use" is in reality just a cover for "the desire to achieve the naked transfer of property from one private party to another." *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003). One powerful sign of that form of political abuse is the unilateral decision by a single person to take the property for its own use under authority delegated by the state, without any form of hearing and without any pretense that the taking in question will advance some comprehensive plan that otherwise would not be implemented.

This case presents a textbook example of the kind of conduct that the *Kelo* decision recognized to be subject to judicial oversight under the Public Use Clause. *Didden* involves an alleged pretextual taking within an official "redevelopment area." The condemnation does not advance the objectives of any integrated plan. Before the taking, Petitioners had determined at their own expense that the site was appropriate for a new pharmacy. After condemnation, another pharmacy is scheduled to be put on the site after the defendant exercised its eminent domain power to in effect

expropriate the Petitioners' business plans. It is highly doubtful that the municipality could have engaged in such highhanded treatment of property owners on its own initiative. It is manifestly outrageous that it could transfer the power of eminent domain so to a private developer and allow him to use it to advance his own interests without any benefit to the public. Yet that is precisely what happened when Gregg Wasser, the designated developer, decided that the Petitioners' property should be taken because they refused to pay him the $800,000 he demanded as the price for avoiding condemnation.

The Second Circuit's decision to uphold this pretextual taking did not probe any of the reasons why the public use requirement remains, even after *Kelo*, an important bulwark against condemnations that "raise a suspicion that a private purpose [is] afoot." *Kelo*, 125 S. Ct. at 2667. Its perfunctory opinion gave Wasser a free pass merely because his use of the condemnation power occurred in a redevelopment area. That holding creates a circuit split with the Ninth Circuit, which in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), held that pretextual condemnations in redevelopment areas are not permitted. This Court should act to resolve this important disagreement.

The root of the Second Circuit's error is its implicit conflation of condemnations that are part of an "integrated development plan" with ones that merely occur within a redevelopment area. *Kelo*, 125 S. Ct. at 2667. *Kelo* does not explicitly address the question of whether such a conflation is proper. If the Court allows clearly pretextual condemnations to go forward merely because they occur within a redevelopment area, then the proliferation of these areas will open the door to widespread abuses of political power. Self-interested private parties would bid and lobby local governments to create redevelopment areas that they could then turn into cash cows for themselves. The threat of condemnation to extort money from property owners would

not be the exclusive province of Gregg Wasser. He would become a role model for others.

Judicial deference does not apply to pretextual takings when local governments simply defer to the self-interested agendas of private parties. The expertise of municipal governments offers no protection when they make no effort to decide which condemnations best serve "public needs." *Kelo*, 125 S. Ct. at 2664. One-to-one pretextual takings of this kind, where there is no change in land use, do not raise any hint of the "holdout" problems that may justify resort to eminent domain in other situations. *Id.* at 2668 n.24.

ARGUMENT

I. THIS CASE OFFERS AN EXCELLENT OPPORTUNITY TO ADDRESS THE IMPORTANT QUESTION OF WHETHER *KELO* PERMITS PRETEXTUAL TAKINGS IN ANY SITUATION WHERE THE CONDEMNATION OCCURS IN A "REDEVELOPMENT AREA."

The present case tests the limits of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), as the Court has yet to resolve the crucial question of whether pretextual takings are permissible within a "redevelopment area." It is difficult to imagine a clearer example of a pretextual condemnation in a redevelopment area than *Didden*. The challenged condemnation occurred only because the Petitioners refused to pay a private developer the $800,000 he demanded as the price for avoiding the taking of their property. Pet. Cert. at 5. If in fact, the compensation awarded in such cases left the property owner indifferent to the condemnation, then this threat would never be credible. The property owner would instead welcome the condemnation in order to save the $800,000 or to get full value for his full property rights in the project. But the credible nature of this threat shows

conclusively that the condemnation figures offered are typically too low, for they do not protect the value of the business plans embodied in the site. The low measure of compensation therefore make it imperative to limit the threat advantage that private parties can obtain by gaining control over local development plans. It seems clear that the municipality could not make that threat itself. Nor then should it be able to delegate this power to a private party. The case presents an excellent opportunity to address whether pretextual takings are constitutionally permissible within a redevelopment area.

A. *Kelo* requires judicial deference in cases where a taking is part of an integrated development plan, but forbids pretextual takings.

1. *Kelo* does not sanction pretextual takings.

Kelo upheld the constitutionality of condemnations for purposes of "economic development" on the ground that that condemnations executed as part of an "integrated development plan" deserve a high degree of judicial deference. *Id.* at 2667. But it also emphasized that government may not condemn property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 2661. Its illustration of this point was the kind of case we have here: a "one-to-one transfer of property, executed outside the confines of an integrated development plan." *Id.* at 2667. That kind of self-dealing is suspect because it "raises the suspicion that a private purpose was afoot." *Id.* at 2665.

Justice Kennedy's concurring opinion—written by the swing voter in a 5–4 decision[2]—also underscores the need to rein in pretextual takings. Justice Kennedy reiterated the principle that "transfers intended to confer benefits on particular, favored, private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 2669 (Kennedy, J., concurring). He also emphasized that courts must "strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* In cases where there is "a plausible accusation of impermissible favoritism to private parties," he would require courts to "treat the objection as a serious one and review the record to see if it has merit." *Id.*

2. Pre-*Kelo* precedents also do not endorse pretextual takings.

The Supreme Court's pre-*Kelo* public use decisions also do not permit pretextual takings. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) required courts to defer to legislative judgment in cases where there is a legitimate public use, but also reiterated the principle that "'one person's property may not be taken for the benefit of another private person without a justifying public purpose.'" *Midkiff*, 467 U.S. at 241 (quoting *Thompson v. Consol. Gas Util. Corp.*, 300 U.S. 55, 80 (1937)). There is no true "justifying public purpose" for pretextual takings that only serve the self-interested machinations of a private party.

In this connection, the Court's earlier decision in *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930), emphasized that "a bare recital" of an alleged public use by a local government fails to satisfy constitutional requirements.

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[2] Because Justice Kennedy chose to sign on to the majority opinion rather than concurring in judgment only, his opinion is not a binding precedent. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (noting the rules that apply to cases with multiple opinions).

Property cannot be condemned on the basis of claimed public uses that are "foreign to the actual purpose of the appropriation." *Id.* at 446. *Vester* was favorably cited in *Kelo* and remains good law. *See Kelo*, 125 S. Ct. at 2667 n.17 (citing *Vester* as a case that justifiably invalidated a condemnation for which no "reasoned explanation" was offered).

B. The present case presents an ideal opportunity to reexamine the law of pretextual takings within a redevelopment area.

1. Petitioners' property was condemned because of their refusal to pay a private party $800,000 in order to avoid condemnation.

Pretextual takings are cases where the "ostensible public use" that supposedly justifies a condemnation is just a cloak for the "the desire to achieve the naked transfer of property from one private party to another." *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003). The condemnation of the Petitioners' property is an unusually blatant example of that phenomenon.

Gregg Wasser, the developer who was awarded the contract to rebuild the Redevelopment Area, decided to condemn the Petitioners' property because they refused his demand that they either pay him $800,000 or make him a 50% partner in their plan to build a CVS store on site. Pet. Cert. at 5.

On these facts, the Court therefore must assume that there is "a plausible accusation of impermissible favoritism to private parties." *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring). Wasser's planned use for the property—a

Walgreens drug store—is virtually identical to the Petitioners' plan to build a CVS drug store. *See* Pet. App. at 22-24. There is no indication that the Village went ahead with the condemnation because its planners somehow believed that a Walgreens would better promote local economic development than a CVS; nor does the record reveal any other public interest that would be served by condemning the property and transferring it to Wasser.

The Village simply rubberstamped the activities of the private developer. This form of unthinking validation has already drawn the ire of state courts, For example, in *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (hereinafter "*SWIDA*"), the Supreme Court of Illinois held that the decision of a local planning authority to condemn private property in order to furnish a nearby race track with additional parking facilities did not meet public use requirements under state law. That case featured the same willingness of public bodies to defer private parties that is involved in this case. The Illinois decision noted that "SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use." *Id.* at 10. "Rather, this action was undertaken solely in response to [the racetrack owner's] expansion goals," which had no connection to the supposed public use put forward to justify condemnation. *Id.* The present case is strikingly similar, and perhaps involves even greater abdication of public responsibility to a self-interested private party.

2. The Second Circuit's decision to uphold this pretextual condemnation creates a circuit split.

The Second Circuit's cursory decision to permit the pretextual condemnation of the Petitioners' land, Pet. App. at 4, creates a circuit split with the Ninth Circuit's 1996 holding in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

In *Armendariz*, owners of low income housing alleged that the City of San Bernardino sought to condemn their property to build a privately owned shopping mall. *Id.* at 1314-15, 1321. The City claimed that its objective was to serve the public purpose of "the reduction of urban blight." *Id.* at 1314. The Ninth Circuit refused to defer to the City's assertion because "the Takings Clause would lose all power to restrain government takings" if officials "could take private property . . . simply by deciding behind closed doors that some other use of the property would be a 'public use,'" and "later justify their decisions in court" by concocting "'a conceivable public purpose' to which the taking is rationally related." *Id.* at 1321.

While *Armendariz* partly depended on the finding that the alleged public use was decided "behind closed doors" after the fact, *id.*, the Ninth Circuit also held that Supreme Court precedent did not require deference to the City of San Bernardino's claim of alleviating "blight" because the evidence indicated that this rationale was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price." *Armendariz*, 75 F.3d at 1321.

A primarily pretextual claim of public use does not deserve deference because it cannot be considered a true "legislat[ive] judgment of what constitutes a public use," but is rather a mere cover for condemnations designed to benefit private interests. *Midkiff*, 467 U.S. at 240. Numerous state

courts have also refused to defer to condemning authorities in cases where the asserted public use was pretextual.[3] Three United States district courts have since relied on *Armendariz* and refused to defer to pretextual takings that transfer condemned property to private interests.[4] One of these district

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[3] *See, e.g., AvalonBay Cmtys., Inc. v. Town of Orange*, 775 A.2d 284, 299-303 (Conn. 2001) (upholding injunction against condemnation of private property allegedly to alleviate blight because it was a pretext to preventing the construction of affordable housing); *Denver West Metro. Dist. v. Geudner*, 786 P.2d 434, 436-37 (Colo. Ct. App. 1989) (finding that flood control was a pretext for enabling sale of government property); *Wilmington Parking Auth. v. Land With Improvements*, 521 A.2d 227, 232-34 (Del. 1986) (finding parking construction was a pretext for extending benefit to private party); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 103-05 (N.J. Super. Ct. Law Div. 1998) (rejecting pretextual taking intended to benefit casino owned by Donald Trump); *City of Miami v. Wolfe*, 150 So. 2d 489, 490 (Fla. Dist. Ct. App. 1963) (affirming finding that extending roadway was a pretext for the acquisition of valuable riparian rights); *Earth Mgmt., Inc. v. Heard County*, 283 S.E.2d 455, 460-61 (Ga. 1981) (blocking condemnation nominally for a park but actually intended to prevent construction of waste disposal site); *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987) (holding that the construction of a park and moderate income housing was a pretext for excluding low income housing); *Essex Fells v. Kessler Inst.*, 673 A.2d 856, 858 (N.J. Super. Ct. Law Div. 1995) (disallowing borough from condemning property in order to prevent owner from constructing a nursing facility); *Redev. Auth. v. Owners*, 274 A.2d 244, 252 (Pa. Commw. Ct. 1971) (finding land taken on pretext of removing blight was actually to benefit another private party); *S.W. Ill. Dev. Auth. v. Nat'l City Env.*, 768 N.E.2d 1, 9-11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (hereinafter "*SWIDA*") (striking down taking where the claimed public purpose was a pretext for an effort to benefit a private racetrack owner).

[4] *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001),

court decisions was favorably cited by the majority opinion in *Kelo* as an example of a case where a pretextual condemnation was rightly invalidated. *See Kelo*, 125 S. Ct. at 2667 n.17 (citing *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003)).

The supposed public use in the present case is even more blatantly pretextual than that in *Armendariz*. In the latter case, the municipal government made no condemnations solely because the owners of the relevant property had refused to pay a large sum of money to another private party. This circumstance further exacerbates the circuit split created by the Second Circuit's decision.

C. This case raises the important issue of whether all takings within a development area should be conclusively deemed to be part of an integrated development plan.

Kelo does not explicitly consider whether all condemnations within a redevelopment area, including pretextual ones, should be considered part of an "integrated development plan." The Second Circuit completely ignored this critical distinction, despite the manifest risk that private condemnations in redevelopment areas create many opportunities for pretextual takings. Pet. Cert. at 13.

If the Second Circuit is not overruled, private developers will be handed a blueprint on how to take private property for their own benefit, irrespective of any public interest. They will therefore lobby local governments to obtain these valuable rights, and in so doing undermine the security of expectations that allows redevelopment to take place without government intervention. The creation of such

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app. dismissed as moot, 2003 WL 932421 (9th Cir. Mar. 7, 2003) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual.").

areas will usher in a vast new arena for political intrigue by private interests seeking to extract money from current owners by threatening them with condemnation if they refuse to pay.

In *Kelo*, this Court noted that a condemnation executed for the purpose of implementing "an integrated development plan" deserves considerable judicial deference, and that courts should not "second-guess the City's considered judgments about the efficacy of its development plan." *Kelo*, 125 S. Ct. at 2667-68. However, the Court did not hold that a taking in a redevelopment area should receive a high degree of judicial deference if undertaken for purposes of pure private enrichment.

The unconstitutionality of pretextual takings is well illustrated by the case of *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003), a decision favorably cited in *Kelo* as a case where a court justifiably invalidated "a one-to-one transfer of property, executed outside the confines of an integrated development plan." *Kelo*, 125 S. Ct. at 2267 & n.17.

In *99 Cents*, the challenged condemnation, like that in the present case, occurred within a redevelopment area. *See 99 Cents*, 237 F. Supp. 2d at 1125–26, 1130 (noting that the condemnation was part of the "Amargosa Redevelopment Plan" in the "Amargosa Project Area"). Yet the district court invalidated the taking because its true purpose was not to promote the objectives of the redevelopment plan, but to advance the private interests of Costco, the intended new owner of the condemned property. *Id.* at 1128-29. As the court put it, "No judicial deference is required . . . where the ostensible public use is demonstrably pretextual." *Id.* at 1129. The court rejected the City of Lancaster's claim that the purpose of the condemnation was to prevent "future blight" because the true purpose of the taking was "nothing more than the desire to achieve the naked transfer of property from one private party to another." *Id.* at 1129-30.

The present case is a more blatantly "naked" transfer than *99 Cents*. In *99 Cents*, Costco did not seek to condemn the property of the 99 Cents store merely because the latter refused to knuckle under to a threat of extortion. Rather, Costco apparently believed that expansion of its operations into the property occupied by the 99 Cents store would increase the profitability of its own business, a result that the City of Lancaster might find conducive to economic development in the area. *Id.* at 1130-31. In *Didden*, by contrast, Wasser's and the Village's sole motive for condemning the Petitioners' property was the refusal of the latter to pay Wasser the $800,000 he demanded.

D. The Second Circuit erred in holding that the Petitioners' suit is time-barred.

The Second Circuit's holding that the Petitioners' claim is time-barred is no obstacle to granting the petition for writ of *certiorari*. Pet. App. at 3. The Second Circuit held that the petitioners' claim accrued on July 14, 1999 when the Village of Port Chester Board of Trustees declared that the properties in question would be part of a "redevelopment area" where condemnation is permissible. *Id.* at 2. Its holding credits the Petitioners' with the clairvoyance to know in 1999 that Gregg Wasser would make crude efforts at extortion some four years later in 2003. The uncertain course of events in 1999 would have, moreover, likely precluded any federal challenge on the ground that the suit would not be ripe because of the incompleteness of the factual record. The Second Circuit thus puts petitioners in an untenable position by holding that the statute of limitations expired before the case was ripe. It is an evident denial of the most elementary forms of procedural due process to have *no* proper time for bringing suit.

1. The procedural holding that the Petitioners' case is time-barred is dependent on the substantive holding that there is no difference between pretextual and non-pretextual condemnations within a redevelopment area.

The Second Circuit's conclusion that the Petitioners' claim is time-barred is completely dependent on the Second Circuit's substantive ruling that there is no meaningful difference between a condemnation enacted as part of an integrated development and a pretextual condemnation enacted within a redevelopment area. Pet. App. at 2. While the Village of Port Chester Board of Trustees made Petitioners' property part of a "redevelopment area" on July 14, 1999, *id.*, the Petitioners at that time had no inkling of Gregg Wasser's extortionate demands, which were only made four years later, in November 2003. *Id.* Faced with this concrete threat of condemnation, the Petitioners filed suit in federal court two months later, in January 2004, well within the three year statute of limitations. *Id.* at 3. Thus, their claims could be considered time-barred only if the mere possibility of future condemnation as part of an integrated development plan is identical to the pretextual condemnation that in fact occurred.

2. The claim is not time-barred because Petitioners did not know that their property would be condemned until Wasser demanded that they pay him $800,000 to avoid condemnation.

When the Redevelopment Area was established in 1999, no steps were taken to condemn the Petitioners'

property. They therefore had nothing to oppose. The statute of limitations does not begin to run until all elements of the claim have accrued in order to avoid the spectacle of tens or hundreds of individual lawsuits with respect to properties that may never be taken it all. Indeed, if the Petitioners had tried to file a suit to block the Village's actions before November 2003, it might have been dismissed for lack of ripeness. "[F]ederal courts are precluded from adjudicating a claim of a taking for a private purpose" unless the property owner has "demonstrate[d] that he or she received a 'final decision' from the relevant government entity." *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 454 (7th Cir. 2002). Similarly, this court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) noted that "a takings claim challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." The law cannot ban all challenges to government action on the ground that they are either too soon or too late. The usual rule that requires all elements of the claim to accrue before the statute of limitations begins to run avoids that impossible dilemma.

If New York law, as interpreted by the Second Circuit, is so perverse as to require the filing of federal challenges to condemnations before those claims are ripe under federal law, that strengthens the case for granting the petition for writ of *certiorari*. The conflict between New York's requirements and federal ripeness standards would be an additional important issue for this Court to resolve.

II. PRETEXTUAL TAKINGS INTENDED TO BENEFIT PRIVATE PARTIES SHOULD NOT RECEIVE DEFERENCE FROM THE JUDICIARY.

Pretextual takings do not deserve judicial deference of the sort extended to "economic development" takings by the *Kelo* majority. *Kelo*, 125 S. Ct. at 2663-69. Unlike some economic development takings, one-to-one pretextual transfers of property do not involve holdout problems or other complex public policy issues that might justify judicial deference.

A. One-to-one pretextual takings do not deserve judicial deference.

The deference this Court afforded to integrated development plans in *Kelo* rested in large part on the Court majority's belief that condemnation decisions involve complex public policy judgments that justify giving legislatures "broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 125 S. Ct. at 2664. The Court insisted that legislative authorities have greater expertise in determining public needs than the judiciary. *Id.* This rationale, however, cannot apply in cases where the claimed reason for condemnation is purely pretextual. If the condemning authority does not make a meaningful effort to "determine . . . public needs," it has not sought to apply the expertise that warrants judicial deference under *Kelo*. *Id.*

In the present case, Wasser only decided to condemn the Petitioners' property because they refused to meet his demand for $800,000 or 50% of the profits from the CVS venture. His threat negates any meaningful connection between the Village's claimed public use of promoting economic development and the taking of Petitioners' property. Neither the Village nor its residents could have

benefited from either the $800,000 or the 50% partnership interest if the Petitioners had caved in to Wasser. Nor did Village authorities explain why this condemnation would transfer the site to more valuable community uses than the Petitioners' planned CVS drug store. Indeed, Wasser's intended use for the land—opening a Walgreens drug store—was very similar to the Petitioners' plan to open a CVS. *See* Pet. App. at 22-24 (describing the two plans).

Ultimately, Port Chester left it up to Wasser to decide whether or not to condemn the Petitioners' property, Pet. Cert. at 5, without considering whether or not the resulting condemnation would actually serve "public needs." *Kelo*, 125 S. Ct. at 2664. No court should defer to a legislative judgment of public need when no such judgment has been made. Port Chester simply acquiesced in a thinly veiled pretextual rationale for a condemnation undertaken at the behest of a self-interested private party.

B. One-to-one pretextual takings are not needed to overcome holdout problems.

As this Court suggested in *Kelo*, local governments may sometimes properly resort to the use of eminent domain to overcome holdout problems. *Id.* at 2668 n.24. The majority opinion held that this was a "matter of legitimate public debate" best left to the political process, which is in the best position to determine when the eminent domain power is needed to prevent holdouts from blocking socially valuable projects. *Id.* In fact, private developers have often overcome holdout problems without the aid of eminent domain.[5] But

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[5] *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. at 21-29 (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=874865 (visited Nov. 24, 2006) (explaining how private developers can prevent holdout problems by resorting to secret assembly and precommitment strategies); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain*

even if condemnation is sometimes needed to avoid holdouts, that point is not at issue in this case because no holdout problem can arise in one-to-one takings such as that which occurred here.

Holdouts can occur in situations where large-scale projects require assembling a large number of lots owned by numerous different individuals. In such a scenario, even one "holdout" could potentially block an important development project or extract a prohibitively high price for acquiescence.[6] Even though the use of eminent domain may be desirable in those contexts, it is not so here, in the absence of any large-scale project that requires the acquisition of land held by many different owners. If Wasser genuinely values the property in question more than Petitioners do, he could easily acquire it through the ordinary workings of the real estate market. The current owners would have every incentive to sell, since they could get more money by selling the property than by using the land themselves. Wasser's attempted substitution of a Walgreens for a CVS store does not raise holdout issues nor any collective action problem that might potentially require the use of eminent domain. *Cf.* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN 162-69 (1985) (explaining how condemnation may be justified when necessary to overcome collective action problems).

Law: A Rationale Based on Secret Purchases and Private Influence, 92 CORNELL L. REV. 1, 19-31 (2006) (showing how secret assembly is a better way to avoid holdout problems than eminent domain).

[6] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-08 (1972) (classic description of the holdout problem); Lloyd R. Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991) (rigorously explaining the concept of the holdout); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81-82 (1986) (discussing the holdout rationale for eminent domain).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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BART DIDDEN, et al.,

Petitioners,

v.

VILLAGE OF PORT CHESTER, NEW YORK, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

What limits do the Fifth and Fourteenth Amendments place on a state actor's demands for cash in exchange for refraining from or using the power of eminent domain?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by the counsel for all parties and lodged with the Clerk of the Court.

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys represented property owners before this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF also has participated as amicus curiae in important property rights cases before this Court. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005). At present, PLF attorneys are involved in many exactions cases, including one in which the property owners were forced to waive their right to vote in exchange for a building permit. *Griswold, et ux. v. City of Carlsbad*, No. 06-CV-1629-R-LSP (S.D. Cal. filed Aug. 14, 2006). PLF attorneys also have written extensively on eminent domain, exactions, and other important property rights issues. *See, e.g.*, Timothy Sandefur, *Cornerstone of Liberty: Property*

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[1] Pursuant to Supreme Court Rule 37.6 counsel for a party did not author this brief in whole or in part. No person or entity, other than amici curiae, their members, or their counsel made a monetary contribution specifically for the preparation or submission of this brief.

Rights in 21st Century America (2006); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373 (2002).

Because of its history and experience with regard both to the power of eminent domain, and to exactions demanded by government in exchange for the right to use property, PLF believes its perspective will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

The district court dismissed this case on the grounds that the injury to the property owners accrued when the city adopted its redevelopment plan, and not when the property owners were approached with the extortionate demand that they pay $800,000 to avert the condemnation of their property. The court declared that "'threats to enforce a party's legal rights' are not actionable," *Didden v. Vill. of Port Chester*, 322 F. Supp. 2d 385, 390 (S.D.N.Y. 2004) (citing *DiRose v. PK Mgmt. Corp.*, 691 F.2d 628, 633 (2d Cir. 1982)), and since this threat was not a cognizable injury, the court held that the complaint was barred by the statute of limitations. The court of appeals summarily affirmed. *Didden v. Vill. of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006).

The consequence is simply this: where the government's chosen developer, acting under color of state law, uses the threat of eminent domain to exact a cash payment from a property owner, by offering to refrain from taking the land if the owner pays up, the property owner has not been legally injured. This holding is plainly wrong, and creates a dangerous precedent on an important matter of federal law, opening the door to extortionate demands by government and politically well-connected developers. In *Nollan*, 483 U.S. 825, this Court recognized the danger posed by government agents who try to "leverage" the police power for economic advantage, *id.* at 837

n.5. Yet as this case indicates, local officials in the years since *Nollan* have only increased their use of sovereign authority as a means of extracting concessions from property owners who ask for permission to use their land. The prevalence of such exactions is a national problem, and certiorari is warranted here to limit this abuse of property owners' rights, and its pernicious economic consequences.

This case combines the concerns about the leveraging of the police power with the increasing problem of eminent domain abuse. *Nollan* and *Dolan* were written out of a concern that the government would use its power over property to demand unfair concessions from owners who seek permission to use their land, and who are essentially at the government's mercy in the permitting process. But given this Court's decision in *Kelo*, 125 S. Ct. 2655, which granted extensive discretion to government when using its eminent domain powers, government officials (or private parties acting under color of law) now also are able to use *eminent domain* as leverage to demand such concessions.

Thus the petition should be granted for three reasons.

1. Lower courts are divided on whether the limits of *Nollan* and *Dolan* apply to demands for cash as well as to demands for the relinquishment of real property rights. This confusion has fostered a system of exploitation of property owners which is making it increasingly difficult for the poor and members of the middle class to find homes. This case presents the issue squarely: does the Constitution limit a state actor's ability to demand that a property owner make a cash payment in exchange for permission to use the land?

2. The use of eminent domain as "leverage" for demanding a payment from a property owner implicates this Court's unconstitutional conditions jurisprudence—enunciated in *Nollan* and *Dolan*—and, if allowed to continue, will harm property owners even more in the wake of *Kelo*.

3. Lower courts need guidance as to what degree of scrutiny to use in cases in which the use of eminent domain will benefit particular, identifiable private parties. This question was left open by *Kelo*, where four justices rejected the application of heightened scrutiny, four justices would have required it, and Justice Kennedy's concurrence deferred the question for another day.

ARGUMENT

I

THE DISTRICT COURT'S FINDING THAT THE PROPERTY OWNERS WERE NOT INJURED WHEN A STATE ACTOR DEMANDED A CASH PAYMENT AS TERMS FOR NOT USING EMINENT DOMAIN RAISES AN IMPORTANT QUESTION OF FEDERAL LAW

The district court decided, and the court of appeals affirmed, that "threats to enforce a party's legal rights are not actionable." *Didden*, 322 F. Supp. 2d at 390. Yet this Court and several courts of appeal have held that government may not use legal authority as a club with which to extort payments from people. Cases like *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374, rested on the basic principle that government agents should not be allowed to "sell" exceptions to the police power, because, as a realistic matter, agencies and officials acting under state authority would use this as a tool of extortion. Although this case involves eminent domain rather than the police power,[2] the concern remains the same: government may

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[2] This Court has held that the division between these two principles is not always clear. *See, e.g., Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *Kelo*, (continued...)

not use its power to regulate land use to demand concessions from property owners in exchange for permission to use their land. Cases in several different legal fields—property rights, criminal law, and even the law of contract—recognize that the threat to exercise a power can be a wrongful, coercive act, even where the power is legally vested and might otherwise be lawfully enforced.

A. The Court Below Ignored This Court's Repeated Rulings That Government May Not Use Its Powers to Coerce Property Owners Into Giving Up Their Rights

In *Nollan*, this Court explained that for government to use its (otherwise legitimate) permitting powers as a means for demanding that property owners relinquish their rights would amount to "an out-and-out plan of extortion." 483 U.S. at 837 (citation omitted). The *Nollan* "nexus" requirement was necessary to prevent government from exploiting property owners, and extracting from them payments which, in all fairness and justice, ought to be paid by the taxpayers as a whole. *Cf. Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus government may demand a concession from a property owner in exchange for a use permit only when that concession has some logical relationship to a genuine public injury caused by the proposed use. "When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury." *Nollan*, 483 U.S. at 837. Although the government could certainly forbid "shouting fire" or causing other injuries, selling exceptions to that prohibition would "alter[] the purpose" of the law's prohibition, and would "not pass constitutional muster."

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[2] (...continued)
125 S.Ct. at 2685 (Thomas, J., dissenting) (describing how the Court has "equat[ed] the eminent domain power with the police power").

Id. In a footnote, the Court added that allowing "this kind of leveraging of the police power" would lead to "stringent land-use regulation which the State then waives to accomplish other purposes." *Id.* at 837 n.5. The present case fulfills this prediction: here, the de eloper threatened the property owner with the most severe form of land use control—the outright confiscation of his fee—but then offered to waive that act in exchange for $800,000.

In *Dolan*, the Court reiterated its concerns about improper leveraging:

> The government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

512 U.S. at 385. Thus *Dolan*, like *Nollan*, prohibited the use of government's otherwise legitimate regulatory authority as a way to pressure property owners to give up some value to the government. In addition, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the government contended that no taking had occurred when a property owner was forced to install a wire cable as a condition of renting out the property, because the owner could have chosen not to rent out the property, and thereby avoided the taking. This Court rejected the argument: "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation," the Court explained. *Id.* at 439 n.17. But the "choice" faced by the property owners in this case is similar to the "choice" the property owner was offered in *Loretto*: your money or your property rights. In *Loretto*, the Court held that a property owner could not be forced, as a condition of using his or her property in a legitimate way, to give up a property right. The same rule ought to apply here.

As these cases illustrate, the *Nollan* rule "involve[s] a special application of the 'doctrine of "unconstitutional conditions,"' which provides that 'the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan*, 512 U.S. at 385). When government—or a person acting with government authority—makes a demand of a property owner in exchange for granting the owner the freedom to use her property, it is limited to doing so in cases where those demands "rectif[y] only those public problems that flow from the development.... Those exactions that are not needed to offset the actual impact of development are presumed to flow from an improper desire to obtain property without paying for it." Breemer, *supra*, at 397.

Although this case involves eminent domain, instead of the police power, it nevertheless presents this Court with an even more stark example of the abuses with which *Nollan* and *Dolan* were concerned: the property owners were ordered, as a condition of retaining their property rights, to give up $800,000. Yet this case has a still more troubling feature: where the land transfers demanded in *Nollan* and *Dolan* would at least have been retained by the government—the beach access in *Nollan* and the easement demanded in *Dolan* would have been owned by the government—here, the money demanded by the developer would have been transferred to a *private party*, not to public ownership. Had the owners acceded to the demand, therefore, the developer would have essentially "condemned" $800,000 directly into its own pocket. This exploitation of public power to seize money at will for purely *private* benefit violates one of the fundamental purposes of the Constitution. *Cf. Kelo*, 125 S. Ct. at 2661 ("the City would no

doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party").

B. The Decision Below Endangers Longstanding Precedent That Threatening to Exercise a Lawful Power Unless a Person Gives Up a Payment Can Constitute Legal Injury

The concern underlying *Nollan* and *Dolan*—that government could use its power to extort property from citizens—is echoed in several other areas of the law, as well. In each instance, courts have found that where a party threatens another—even with the exercise of lawful authority—if the other party does not pay up, the law has been violated. A police officer has the discretion to write a speeding driver a ticket or to let the driver off with a warning, but demanding a payment in exchange for being let off with a warning would be a violation of the law. In any one of the countless instances in which a government agent has discretionary power, it would be a wrongful act for the agent to exercise that discretion on the basis of a wrongful motive such as a demand for cash payment. Corruption, in fact, has been defined as "the misuse of office for unofficial ends." Robert Klitgaard, *International Cooperation Against Corruption*, 35 Fin. & Dev. 3, 4 (1998).[3] One of the primary purposes of written laws and a written Constitution—and the motivation behind *Nollan* and *Dolan*—was to protect people from the arbitrary exercise of authority, including the wrongful use of power that might otherwise be lawful, to accomplish illegitimate purposes.

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[3] The United Nations Convention Against Corruption art. 15(a) defines the term as including "[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties." *See* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf (last visited Dec. 8, 2006).

Like the law of property rights, the criminal law has long recognized that an official threatening to use government power unless a person makes a payment could qualify as extortion. James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. Pa. L. Rev. 1695, 1702 n.25 (1993). In fact, the Hobbs Act defines extortion as "the obtaining of property from another, with his consent . . . under color of official right," 18 U.S.C. § 1951(b)(2), and the New York Penal Code defines "coercion" as

> compel[ling] or induc[ing] a person to engage in conduct which the latter has a legal right to abstain from engaging . . . by means of instilling in him a fear that, if the demand is not complied with, the actor or another will . . . [u]se or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

N.Y. Penal Law § 135.60(8). This appears to be an accurate description of what is alleged in the complaint. Moreover, this Court has recognized in that the common-law crime of extortion is implicated "when the public official receives a payment in return for his agreement to perform specific official acts." *See Evans v. United States*, 504 U.S. 255, 268 (1992).

Also, in the realm of contract law, the threat to exercise a legal right *can* sometimes constitute duress. In *Link v. Link*, 179 S.E.2d 697 (N.C. 1971), a cuckolded husband demanded that his wife sign over some stock certificates or he would institute divorce proceedings. The court found that this could qualify as duress even though the husband could legally have begun proceedings against her. "Ordinarily," the court held, "it is not wrongful . . . for one to procure a transfer of property by stating in the negotiations therefor that, unless the transfer is

made; he intends to institute or press legal proceedings to enforce a right which he . . . has," *id.* at 705, but

> modern authority supports the rule . . . that the act done or threatened may be wrongful even though not unlawful, per se; and that the threat to institute legal proceedings, . . . which might be justifiable, per se, becomes wrongful . . . if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.

Id. at 705. *Accord, Radford v. Keith*, 584 S.E.2d 815, 818 (N.C. Ct. App. 2003). The Minnesota Supreme Court has also held that a person may have a right to institute legal proceedings,

> [b]ut . . . has no right to threaten another, in order to accomplish an ulterior purpose . . . with an action to enforce some just legal demand where the purpose is not to enforce the demand, but rather by exceeding the needs for enforcement thereof to so use legal process as to oppress his adversary and to cause him unnecessary hardship. A threat to so use legal process constitutes duress where its coercive effect is to overcome the free will of the victim.

Wise v. Midtown Motors, Inc., 42 N.W.2d 404, 407-08 (Minn. 1950). As cases like these reveal, a threat to exercise a legal right can, under certain circumstances, constitute unfair dealing and a legal injury. *See also* Restatement (Second) of Contracts § 176(2)(c) (1981) ("A threat is improper if the resulting exchange is not on fair terms, and what is threatened is otherwise a use of power for illegitimate ends.")

In *Philippine Export & Foreign Loan Guar. Corp. v. Chuidian*, 218 Cal. App. 3d 1058 (Cal. Ct. App. 1990), the California Court of Appeal examined at length the issue of whether the threat to institute legal proceedings can be a

wrongful threat. "[A] person, generally speaking, has a perfect right to prosecute a lawsuit in good faith," the court noted, but "clearly that proposition cannot always be true." *Id.* at 1079. The right to file a lawsuit "has limits .... [W]hen we consider the legitimacy of conduct consisting of attempts to achieve a favorable settlement of litigation, we must also accommodate the values of the adversary system and the rights of persons to be free from pressure that is perceived as 'wrongful.' " *Id.* at 1079-80. Thus, although "[t]he area is fraught with difficulty and each case must depend on a careful weighing of all the circumstances," there are cases in which the threat to exercise a legal right *can* be a legally cognizable harm. *Id.* at 1080.

The decision below conflicts with the long-standing law of several jurisdictions—that threats to exercise government's otherwise lawful use of power are prone to abuse, and such abuses are wrongful acts that courts ought to redress. The court of appeals' summary affirmation provides no explanation for this radical change, which is particularly troubling. This case therefore raises an important question of federal law that must be determined by this Court.

II

OFFICIAL ABUSE OF POWER TO EXTRACT DEMANDS FROM PROPERTY OWNERS IS BECOMING INCREASINGLY COMMON IN THE UNITED STATES

In *Nollan* and again in *Dolan*, this Court sharply rebuked government officials who use their sovereign powers as leverage to extract money, land, or other values from property owners. Unfortunately, state and local governments have continued to engage in such activities. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1513 (2006) ("In the last several decades, there has been a marked shift in local government

financing away from the use of general revenue taxes and toward nontax revenue-raising devices such as exactions.")

Like the property owners in *Nollan* and *Dolan*, the property owners in this case were ordered to give up a value in exchange for permission to use the property that belonged to them. But State Supreme Courts are divided—as are federal circuit courts—as to whether the standards enunciated in *Nollan* and *Dolan* apply to government demands of cash payments, or whether they are limited only to government demands of real property transfers. This case presents the Court with an important opportunity to resolve that conflict.

In addition, as described in Part II.B below, the continuing use of government's power over real property as a mechanism for demanding that property owners give up either cash payments or real property rights has become a serious threat to the nation's economy. Although it is impossible to say exactly what affect it's having in the business community, abuses by local governments are harming homeowners, and increasing the scarcity of housing. This Court should grant certiorari to address this growing problem.

A. Courts Are Divided Over *Nollan*'s Applicability to Monetary Exactions

Both *Nollan* and *Dolan* involved demands by the government that property owners give up some interest in property. But this Court has not addressed the question of whether the *Nollan* and *Dolan* rules apply to demands for cash payments as well as for real property. In *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996), the California Supreme Court held that the rules do apply, because the concern underlying these cases was that government could use its authority to compel property owners to give up some of their rights in exchange for a permit, and these concerns were equally present with regard to money demands, as to real property demands. Texas and Arizona

courts have agreed, *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997). There are many others. *See, e.g., Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994).

Yet the Colorado Supreme Court has rejected this view, holding that *Nollan* and *Dolan* apply narrowly only to demands for real property. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001). The Ninth and Tenth Circuits have followed this route. *See Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995); *Commercial Builders of Northern Cal. v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). This Court has been repeatedly asked to resolve this question. *See, e.g., Drebick v. City of Olympia*, 127 S. Ct. 436 (2006); *Hammer v. City of Eugene*, No. 05-1643 (U.S. Sup. Ct. *cert. denied* Oct. 2, 2006). This case presents an important opportunity to settle this issue, and to clarify that the constitutional limits which forbid extortionate or unrelated demands from property owners are applicable to monetary exactions as well as to exactions of real property.

B. Exactions Abuse Is Having Deleterious Legal and Economic Effects Nationwide

The increasing tendency of government to demand payments or other concessions in exchange for permission to use land is having far-reaching negative consequences in the law and the economy. Although information is not available for the economic effects of these exactions on business property, there are extensive studies of their effect on the housing market. Exactions in exchange for permission to build are increasingly

common with regard to residential construction, and without action by this Court, are likely to worsen.

In one recent case, *Ahmad v. City of Elk Grove*, No. 05CS01760 (Sacramento Super. Ct. filed Dec. 22, 2005), a married couple was ordered to pay more than $240,000 in "roadway fees" and to dedicate a six-foot "landscape easement" along one side of their property in exchange for a permit allowing them to construct a single family home on their property in Elk Grove, California. After negotiations, the city decreased its demand to $142,000. Only after a lawsuit was filed in state court by attorneys from amicus PLF did the city reduce its demand; the parties settled on the amount of $9,750.

In another case currently being litigated by attorneys from amicus PLF, the Griswold family of Carlsbad, California, was ordered to pay almost $115,000 for street improvements in exchange for a building permit that would allow them to add three rooms to their home. *Griswold*, No. 06-CV-1629-R-LSP. In the alternative, the city allowed the Griswolds to defer this payment *if they signed a contract waiving their right to vote* on property assessments—a right guaranteed by the state constitution. City officials later told reporters that "development is a privilege and development is allowed to be conditioned." Michael Burge, *Property Rights at Issue*, San Diego Union-Tribune, Aug. 16, 2006, *available at* 2006 WLNR 14318080. Thus government could demand what it wanted from a property owner seeking a permit.

State and local governments are routinely using their police powers to demand that property owners give up their rights in exchange for reprieve from government land use controls. As this case reveals, a similar risk is posed by the use of eminent domain for private development. At bottom, the same issue is involved: government is demanding payment in exchange for allowing a property owner to use his or her land. Certiorari is warranted in this case to clarify the constitutional

limits on state actors' ability to demand payment in exchange for respecting their property rights.

The continuing exploitation of the police power as a tool for demanding concessions from property owners is having deleterious effects on the national housing market, and those effects are an indication of what will likely result if similar exploitation of the eminent domain power is allowed to continue. Official demands that property owners give up some portion of their rights in exchange for permission to use their property has become a leading cause of increased housing scarcity: one recent report found that nationwide, more than 30 percent of the entire value of houses is "attributable to prices inflated by planning-induced housing shortages." Randal O'Toole, American Dream Coalition, *The Planning Penalty: How Smart Growth Makes Housing Unaffordable* 2 (Mar. 2006).[4] Other research substantiates this finding. *See, e.g.*, Edward L. Glaeser, et al., The Manhattan Institute, *Why is Manhattan So Expensive? Regulation and the Rise in House Prices* (Aug. 30, 2004)[5] ("available data indicate that especially in expensive coastal areas, there often is a substantial gap between the price of housing and construction costs. This gap suggests the power of land use controls in limiting new construction." *Id.* at 37).

In fact, the cost of permission to build—very often in the form of exactions demanded in exchange for building permits—is the *single largest element* in the cost of new housing, and in some places, such as California, that cost is extremely severe. Edward L. Glaeser, et al., *Why Have Housing*

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[4] *Available at* http://www.americandreamcoalition.org/Penalty.pdf (last visited Dec. 8, 2006).

[5] *Available at* http://www.economics.harvard.edu/faculty/glaeser/papers/Manhattan.pdf (last visited Dec. 8, 2006).

Prices Gone Up? (Dec. 28, 2004).[6] It is reasonable to assume that exactions are having similar effects on the cost of business property construction, and that these costs are being passed on to the consumer in the form of higher prices. *See also* John Landis, et al., Cal. Dep't of Hous. & Comm. Dev., *Pay to Play: Residential Development Fees in California Cities and Counties, 1999* 103 (Aug. 2001)[7] (reporting that California home builders in 1999 paid fees averaging $24,325 per single-family home); Marla Dresch & Steven M. Scheffrin, Pub. Policy Inst. of Cal., *Who Pays for Development Fees and Exactions?* at v (June 1997)[8] ("fees imposed on new construction are significant, typically falling in the range of $20,000 to $30,000 per dwelling.") According to the California's Department of Housing and Community Development, the state "leads the nation in imposing fees on new residential development . . . . which vary widely from jurisdiction to jurisdiction, often with no explicit rationale. They average $20,000 to $30,000 per unit and account for more than 15 percent of new home prices in jurisdictions providing substantial shares of affordable housing." State of California Little Hoover Commission, *Rebuilding the Dream: Solving California's Affordable Housing Crisis* 39 (May 2002).[9]

By raising the cost of producing new houses, impact fees and other exactions are steadily raising the cost of

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[6] *Available at* http://post.economics.harvard.edu/faculty/glaeser/papers/Housing_Prices.pdf (last visited Dec. 8, 2006).

[7] *Available at* http://www.hcd.ca.gov/hpd/pay2play/fee_rpt.pdf (last visited Dec. 8, 2006).

[8] *Available at* http://www.ppic.org/content/pubs/report/R_697SSR.pdf (last visited Dec. 8, 2006).

[9] *Available at* http://www.lhc.ca.gov/lhcdir/165/report165.pdf (last visited Dec. 8, 2006).

housing—with the impact falling hardest on first-time home buyers and other newcomers to residential areas. Landis, et al., *supra*, at 107 ("Fees are highest relative to housing prices in the State's fastest growing and most affordable communities"). *See also* Edward Stringham, et al., *Taxing Development: The Law and Economics of Traffic Impact Fees*, 16 Boston U. Pub. Int. L. J. ____ (forthcoming, 2006) ("In the long run, high fees give developers an incentive to build more expensive homes . . . [and] to target higher income buyers who may be less sensitive to price increases. Ultimately, fewer buyers can qualify to purchase homes than otherwise because of excessive impact fees.")

As local government officials exploit the unsettled nature of the exactions jurisprudence that has developed in the years since *Nollan* and *Dolan*, these harmful consequences will only increase, making housing more scarce and therefore more difficult for poor and middle class first-time home buyers to enter the housing market. And if officials or developers use the threat of eminent domain to demand concessions from owners of business properties, as in this case, similar economic problems are likely to result. Granting certiorari in this case to clarify the constitutional limits on government's power to demand payment in exchange for permission to use property would help to fix this serious national problem.

III

LOWER COURTS NEED GUIDANCE AS TO THE LIMITS THAT *KELO* PLACES ON THE DISCRETION OF LOCAL OFFICIALS

This case overlaps the categories of *Nollan*, which involved the exploitation of the police power, and *Kelo*, which involved the use of eminent domain for economic development. This indicates the need for this Court not only to address the exactions issue raised here, but also to clarify the limits on eminent domain under the Fifth and Fourteenth Amendments.

In *Kelo*, the Court held that government has broad discretion to use eminent domain to transfer property to different owners for purposes of economic development. Although a plurality of the Court rejected the application of any scrutiny higher than rational basis review, 125 S. Ct. at 2664, Justice Kennedy explained in his concurrence that when a court is "confronted with a plausible accusation of impermissible favoritism to private parties," it ought to "treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." 125 S. Ct. at 2669. This presumption might be abandoned in cases in which "the risk of undetected impermissible favoritism of private parties is . . . acute." *Id.* at 2670. This holding is confusing because, without applying heightened scrutiny at the outset, it is inherently difficult for a court to detect "impermissible favoritism." Lower courts therefore need guidance as to where heightened scrutiny should apply.

In *Western Seafood Co. v. United States*, No. 04-41196, 2006 WL 2920809 (5th Cir. Oct. 11, 2006), for example, the court of appeals declined to apply heightened scrutiny in a case in which the condemnation involved a transfer of property to the benefit of a discrete private beneficiary. As part of its redevelopment plan, the City of Freeport is seeking to condemn the property of the Western Seafood company and transfer it to a company owned by an influential developer named H. Walker Royall—a "particular . . . identifiable individual[]," *Kelo*, 125 S. Ct. at 2662—to operate as a private, for-profit enterprise. But the court found that "[t]he evidence provided by Western Seafood does not support the inference that the City exhibited favoritism or has a purpose other than to promote economic development in Freeport." 2006 WL 2920809 at *5. By applying a deferential standard of scrutiny at the beginning of the analysis, the court found that the redevelopment project exists to promote general economic development, and therefore

rejected the use of heightened scrutiny—precisely the sort of scrutiny that might have uncovered the unconstitutional favoritism.

In another recent case, a New Jersey court relying on *Kelo* declared that a person challenging the constitutionality of a taking of her property "can overcome a presumption of validity only by proofs that there could have been *no set of facts* that would rationally support a conclusion that the enactment is in the public interest." *City of Long Branch v. Brower*, 2006 WL 1746120, at *10 (N.J. Super. Ct. June 22, 2006) (emphasis added). Such a high degree of deference makes it practically impossible for a property owner to prevail in court, no matter how suspect the condemnation. As Justice Stevens himself has remarked on more than one occasion, "[j]udicial review under the 'conceivable set of facts' test is tantamount to no review at all." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (citation omitted). Yet it is difficult to discern how lower courts should enforce *Kelo*'s prohibition on takings which "confer[] a private benefit on a particular private party." 125 S. Ct. at 2661.

The *Kelo* decision was greeted with a nationwide outcry, which included an official resolution in the House of Representatives repudiating the decision. *See* H.R. Res. 340, 109th Cong. (2005). Yet in the one year after the *Kelo* decision was announced, more than 5,000 properties across the country were condemned or threatened with condemnation for various private development projects—more than three times the national average for a one-year period. *See* Dana Berliner, Institute for Justice, *Opening the Floodgates: Eminent Domain Abuse in the Post-Kelo World* 2-3 (June 2006).[10] In fact, one of the primary concerns raised by *Kelo* is that private developers

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[10] *Available at* http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (last visited Dec. 8, 2006).

will exploit the power of eminent domain for their own private benefit in just the manner alleged in the complaint in this case.

The exploitation of eminent domain to exact a cash payment from a property owner pushes the limits of the *Kelo* decision and is so far removed from the accepted and usual legal proceedings as to call for an exercise of this Court's supervisory power. *See* U.S. Sup. Ct. R. 10(a). The Court should take this opportunity to address the limits on official discretion to take property for private development.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

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